

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDGAR M. WAYNE,

Defendant-Appellant.

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UNPUBLISHED  
December 1, 2000

No. 216366  
Wayne Circuit Court  
LC No. 98-005806

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by denying his request to represent himself during trial. We disagree. A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution and explicitly guaranteed by the Michigan Constitution. US Const, Am VI; Const 1963, art 1, § 13; *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975); *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, an unavoidable tension exists between a criminal defendant's constitutional right to counsel and his constitutional right to self-representation. *Id.* Whether a trial court denied a defendant his constitutional right to self-representation is a question of law. We review questions of law, specifically constitutional issues, under a de novo standard of review. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999).

Because "criminal defendants represented by lawyers 'stand a better chance of having a fair trial than people without lawyers,'" we recognize a presumption against the waiver of a criminal defendant's right to counsel. *People v Belanger*, 227 Mich App 637, 641; 576 NW2d 703 (1998). A defendant's request to waive his right to counsel and represent himself must be unequivocal, and the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. *Adkins, supra* at 722; *Belanger, supra* at 642. In order to assure that a defendant's waiver of his right to counsel is knowing and voluntary, "the trial court must make the defendant aware of 'the dangers and disadvantages of self-representation, so that the

record establishes that the defendant knows what he is doing and his choice is made with eyes open.”” *Adkins, supra* at 722, citing *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976).

Further, the court must comply with the requirements of MCR 6.005. *Adkins, supra* at 722; *Belanger, supra* at 642. The court rule requires the trial court to advise the defendant as to the crime charged, the possible punishment for the crime, and the risk involved in self-representation. The court rule also requires that the court offer the defendant the assistance of an attorney. MCR 6.005(D); *Adkins, supra* at 722; *Belanger, supra* at 642. A trial court must substantially comply with the above requirements, in order to ensure that a defendant’s waiver is valid. *Adkins, supra* at 726. “If a trial court is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant’s request to proceed in propria persona, noting the reasons for the denial on the record.” *Id.* at 727.

In the present case, we do not believe that defendant’s request to represent himself was unequivocal, as required for a valid waiver. *Adkins, supra* at 722; *Belanger, supra* at 642. On the second day of trial, defendant requested that he either be granted substitute counsel or that he be allowed to represent himself. Because defendant’s request to represent himself was made in the alternative, we conclude that it was not unequivocal and did not constitute a valid waiver of counsel. *Adkins, supra* at 722; *Belanger, supra* at 642.

Further, a defendant’s request to waive his right to counsel should only be granted if the court determines that the defendant will not unduly disrupt the court while acting as his own counsel. *Adkins, supra* at 722; *People v Ramsdell*, 230 Mich App 386, 405; 585 NW2d 1 (1998). “Where a defendant behaves in a disruptive manner and makes a motion to proceed pro se for surreptitious reasons, a trial court may appropriately deny self-representation. *Id.* at 406. In the present case, the record clearly shows that defendant behaved in a disruptive manner. He attempted to walk out of the courtroom and he repeatedly ignored defense counsel during voir dire when counsel was attempting to communicate with him. On one occasion, defendant turned his chair around when his attorney attempted to consult him. Because defendant behaved in a disruptive manner, we conclude that the trial court did not err by denying his request to represent himself. *Id.*

Defendant next argues that the trial court should have granted a mistrial because two prospective jurors expressed to the trial court that defendant’s actions in the courtroom had already convinced them that he was guilty of the charged crimes. First, we note that the trial court dismissed those prospective jurors, and they did not serve on the jury which convicted defendant of the charged crimes. Second, any prejudice created in the minds of the jurors was not created by the trial court’s denial of defendant’s request to represent himself, but was created by defendant’s unruly behavior. The trial court was under no obligation to declare a mistrial simply because defendant refused to conduct himself in an appropriate manner at trial. To hold otherwise would provide criminal defendants the means to compel a mistrial at the defendant’s own discretion. Because the trial court properly denied defendant’s request to represent himself, a mistrial was not warranted.

Defendant next contends that the trial court should have instructed the jurors that the breakdown in the attorney-client relationship between defendant and his trial counsel should not

affect their verdict. Because defendant failed to request such an instruction at trial, this issue is not properly preserved for appellate review. Instructional error should not be considered on appeal unless the issue has been preserved by an objection in the trial court. Relief will be granted absent an objection only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We believe it was the behavior of defendant, rather than that of defense counsel or of the trial court, which influenced the opinions of the two prospective jurors. Defense counsel attempted to cooperate with defendant during trial and sought defendant's assistance in the defense of his case. The trial court warned defendant that his actions would reflect upon him and that he alone would suffer the consequences of his behavior. The court was under no obligation to instruct the jury, sua sponte, that the breakdown between defendant and his attorney should not affect its verdict. Finding no manifest injustice, we hold that the trial court did not err in this regard.

Defendant next argues that the trial court abused its discretion by denying his request to substitute his appointed attorney. We disagree. While an indigent defendant is guaranteed the right to counsel, he is not entitled to have the counsel of his choice appointed simply by requesting that the attorney originally appointed be replaced. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991):

Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. The trial court's decision regarding the substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent showing of an abuse of that discretion.

We conclude that defendant's request for substitute counsel was not supported by a showing of good cause. In the trial court, defendant based his request for substitute counsel on the grounds that he believed his attorney did not communicate with him, failed to inform him that he was entitled to an independent evaluation on the issue of diminished capacity, and failed to subpoena vital witnesses. At trial, however, defense counsel stated that he and defendant had a very friendly meeting the previous evening at which counsel explained the entire process to defendant. In fact, counsel expressed surprise at defendant's sudden attitude change on the morning of the second day of trial. Counsel also stated that defendant had informed him that he did not want an independent examination and that they had decided together to forego the independent examination. Counsel responded to defendant's allegation regarding the failure to subpoena witnesses by stating that he had interviewed both potential witnesses and neither of them indicated that they witnessed anything regarding the shooting. Therefore, the record does not demonstrate that good cause for the substitution of counsel existed in the present case. *Mack*, *supra* at 14.

Further, the record reveals that defense counsel was prepared for trial and was competent to represent defendant. Counsel vigorously argued defendant's case, as illustrated by his lengthy argument in response to a hearsay objection by the prosecutor, his motion for a directed verdict, and his renewed motion for a directed verdict or for a new trial at defendant's sentencing hearing.

In addition, defendant and defense counsel discussed and together decided to request a voluntary manslaughter instruction and to forego an instruction on imperfect self-defense. They also discussed and decided together to waive certain prosecution witnesses and to forego defendant's right to testify. Therefore, defendant assisted his attorney in his defense and made important decisions regarding his trial. As such, it cannot be said that there existed a legitimate difference of opinion regarding a fundamental trial tactic, and the record does not support defendant's argument that good cause existed for substitution of defendant's appointed attorney.

Finally, defendant contends that the verdict on the first-degree murder charge was against the great weight of the evidence. We disagree. We review a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Id.*

A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict, so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Furthermore, a verdict may be vacated only when it is not reasonably supported by the evidence and is more likely attributable to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

To convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. MCL 750.316(1)(a); MSA 28.548(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors evidencing premeditation include: (1) the prior relationship between the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Plummer*, *supra* at 301; *Anderson*, *supra*, 209 Mich App at 537.

The evidence presented in this case did not preponderate heavily against the verdict. The evidence revealed that the victim telephoned defendant's girlfriend, Debra Crosby, earlier on the day of his death. He then arrived at defendant's residence at about 11:30 p.m. and stood outside, calling Debra's name. He looked very angry and was moving around as if he was upset. When Debra came outside, she and Young began arguing. Defendant heard them arguing and stood inside the doorway, watching them. Young yelled for defendant to come outside and threatened defendant. Defendant went upstairs to retrieve a gun, then exited through the back door and walked around the side of the house. Defendant shot Young from a distance of approximately three feet and fled the area. He turned himself in to the police nearly one year later.

We believe that premeditation and deliberation can be inferred from the above circumstances. Defendant's decision to bring the gun with him outside to confront Young supports a finding that he intended to kill Young and that his actions were premeditated. The fact that defendant exited through the back door and walked around the side of the house

evidenced his intent to surprise Young. In addition, defendant's flight after the incident further illustrated his premeditation of the killing and his desire to avoid arrest.

Finally, the fact that defendant's statement to police and Marshall Crosby's testimony conflicted as to the circumstances immediately preceding the shooting casts doubt on defendant's theory of self-defense. Crosby testified that Young told defendant, "I'm going to pop you, man," immediately before Young lunged toward defendant. On the other hand, defendant told police that immediately before he fired, Young said, "so what, bitch, you're going to shoot me now? You're going to shoot me?" This discrepancy may have led the jury to disbelieve that Young challenged defendant prior to the shooting. In addition, while neither Crosby nor witness Laura Neal saw a knife tucked into Young's pants, Officer Anthony Potts discovered the handle of a knife protruding from the waistband of Young's pants, when he arrived at the scene. This discrepancy may have indicated that someone placed the knife on Young's body to substantiate a self-defense theory. Therefore, the circumstances surrounding the killing supported the jury's finding of premeditation and deliberation on the part of defendant. The trial court did not abuse its discretion in denying defendant's motion for a new trial because the jury's verdict was not against the great weight of the evidence.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Donald E. Holbrook, Jr.  
/s/ Hilda R. Gage