STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2001
v	No. 217348 Wayne Circuit Court Criminal Division LC No. 97-006165
ARTHUR JACKSON, Defendant-Appellant.	

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of thirty to fifty years' imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions but remand for modification of his sentences.

This case arose from the death of Shannon Keith Smith, whom the prosecution contended was shot by defendant in an alley in Detroit on November 9, 1996. Smith was found by the police on the front porch of a nearby home bleeding from a chest wound.

At approximately 9:35 p.m. on the evening in question, Detroit police officer Robert Kosinski was called to the area of 11980 Racine in Detroit to investigate a shooting. On arriving, he saw the victim lying on the front porch, bleeding from a gunshot wound to the chest. Kosinski questioned the victim about who shot him, and the victim "just repeated 'Tone'". Shortly after EMS arrived, Kosinski asked where "Tone" lived, and the victim pointed his head north, in the direction of Barlow Street, where defendant lived.

Sharon Evans, who lived with defendant and was his girlfriend at the time, testified that defendant went by the nickname "Tony" and that she was not sure if he also had the nickname "Tone." At trial, Evans admitted giving a previous statement that defendant went by "Tone." The prosecution also presented the testimony of Clarice Billops, who stated that she lived with defendant at the time of the shooting and that defendant went by the nicknames "Tony or Tone." She also stated that she knew defendant owned a shotgun at the time of the shooting.

Detroit Police Sergeant Anthony Woodford testified that he arrived at the scene around 10:30 p.m., noticed some blood in an alley that he traced to the porch where the victim was found, surveyed the neighbors, and was directed toward defendant's house. When Woodford entered the house, he asked two women present whether they knew of an individual named "Tone," and they said he was in the house. Woodford's observations triggered a request to the homicide investigation technicians to perform a gunshot residue test on defendant. Detroit Police technician Randy Richardson testified regarding the gunshot residue test that he told defendant what he was going to do before swabbing defendant's hands and forehead. Defendant did not object to the residue test. The results of the residue test were placed into evidence at trial.

Erica Mohr, a nurse at St. John's Hospital, testified that at approximately 6:00 p.m. on November 11, 1996, she witnessed investigator Richard Ivy questioning the victim in his hospital room. The victim's condition was critical, but he could nod or shake his head to answer yes or no questions. Mohr stated at trial that when Ivy asked the victim if Tony shot him, the victim nodded his head affirmatively, and when Ivy asked the victim if Tony's real name was Arthur Jackson, he answered affirmatively.

I

Defendant first argues that the trial court erred by allowing him to represent himself at trial. We disagree.

The right of self-representation is implicitly guaranteed by the Sixth Amendment to the United States Constitution and explicitly guaranteed by Article 1, § 13 of the Michigan Constitution. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). See also MCL 763.1. However, that right is not absolute. *Anderson, supra*. Before a trial court may grant a defendant's request to proceed in propria persona, the court must substantially comply with the requirements set forth in *Anderson* and MCR 6.005. *People v Adkins (After Remand)*, 452 Mich 702, 726; 551 NW2d 108 (1996). In *Anderson, supra* at 367-368, the Supreme Court set forth the following three requirements that must be satisfied before a trial court may grant a defendant's request for self-representation: (1) the defendant's request must be unequivocal; (2) the court must determine whether the defendant's request was made knowingly, intelligently, and voluntarily; and (3) the court must determine that the defendant will not unduly disrupt the court while acting in propria persona. See also *Adkins (After Remand), supra* at 722. With regard to the second requirement, "[t]he trial court must make the . . . defendant 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." *Anderson, supra* at 368. The trial court must also satisfy the requirements of MCR 6.005, which serve to inform the defendant of the risks of self-representation. *Adkins (After Remand), supra* at 722.

Before trial, defendant requested to proceed in propria persona. The record reveals that defendant was uncooperative with his appointed counsel, refused to sign the appointment form and filed a number of grievances against at least two attorneys appointed to represent him. In response to one of the grievances, one of the appointed attorneys moved to withdraw as counsel. At the November 5, 1997 hearing on that motion, Wayne Circuit Court Judge Craig Strong advised defendant of the charges pending against him and the maximum sentences the charges

carried. At that hearing, defendant made one of his requests to proceed in propria persona. The following colloquy transpired:

> MS. REED [*defendant's counsel*]: Mr. Jackson has written the Court and indicated to the Court and to me that there's a break down [sic] in our relationship and he does not want me to represent him.
>
> Based on that, I have submitted to the Court my motion to withdraw from the case.
>
> THE COURT: All right. Anything?
>
> THE DEFENDANT: Yes, sir. I have – I had axed to (phonetic) proceed pro se, you know, as the defendant-lawyer representing myself, because I've been violated my constitutional rights. It's been improper bind over. I've been arrested for this crime three times. And it's to my understanding that defendant is to inform the attorney of his counsel, and then in return, his counsel supposed to file the necessary motion to suppress or whatever. And all attorneys seem to deviate from that. So all of the court appointed assistance have been ineffective in my behalf.
>
> THE COURT: How many lawyers have you had thus far?
>
> THE DEFENDANT: I've had Attorney Raymond Willis, and Attorney Donald Cook, and Ms. – Attorney Susan Reed was kinda' like imposed on me, forced on me, after Judge Bradfield denied me of exercising my Sixth Amendment to proceed pro se. Also—
>
> THE COURT: Did you file a motion to that effect, about wanting to proceed to represent yourself?
>
> THE DEFENDANT: No, sir, I haven't filed a motion. I just stated it for the record.
>
> THE COURT: All right.
>
> MR. DAWSON [*co-counsel for the prosecution*]: Your Honor—
>
> THE COURT: **You understand that if I allow you to represent yourself, you would be held to the same high standards as though – as an attorney**?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You would have to become familiar with the Rules of Evidence. The Michigan Rules of Evidence. You understand that?
>
> THE DEFENDANT: Yes, sir.

THE COURT: Do you have a copy of them?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have access to them?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You understand that you would have to use the same procedures as any lawyer would have to, and that you would have to be bound by what I ruled as the Judge? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: How far have you gone in school?

THE DEFENDANT: I been to the ninth, and then—

THE COURT: The ninth grade?

THE DEFENDANT: Yeah. I'm a GED graduate.

THE COURT: Okay. So you've got your GED degree?

THE DEFENDANT: Yeah. I went to other schools.

THE COURT: Have you studied the law before, or represented yourself in the past?

THE DEFENDANT: No, sir, I haven't.

THE COURT: Why do you feel you're qualified to do that?

THE DEFENDANT: Well, I just figured that – you know, that I'm innocent and I'm being treated unfairly. And I don't think that I need a counsel to address the truth or anything to hide behind, and in order to – and to address it in a professional way.

THE COURT: Madam clerk, has this case been set for trial?

THE CLERK: No, sir. We were at the final conference level, and Ms. Reed had filed motions.

THE COURT: All right. Schedule a trial date. And, **Ms. Reed, I'm not going to let you off the case.**

You are familiar with the case?

MS. REED: Yes, your Honor.

THE COURT: And you are prepared for trial in this matter?

MS. REED: I have some motions that I've filed that have not been heard since Mr. Jackson had written the Court and indicated that he did not want me to proceed, but –

THE COURT: Where are they?

MS. REED: Those are the motions that were filed.

THE COURT: All right. **Sir, you understand that the charge in this case, according to your letter, is murder in the second degree and felony firearm, and murder in the second degree carries a maximum sentence up to life in prison, and the felony firearm is a two-year mandatory sentence? You understand that?**

THE DEFENDANT: Yes, sir. Your Honor, you think I can get you to look the [sic] motion that I prepared in my own behalf?

* * *

THE DEFENDANT: It's based on a motion for dismissal. A motion to squash (as spoken), stating all the violations and the improper bind over and abuse of discretion.

THE COURT: All right. You may present it.

THE DEFENDANT: Thank you.

THE COURT: It won't be argued today, though.

THE DEFENDANT: Yes, sir.

Attorney Reed later argued a motion in limine, motion to dismiss and motion to quash the information on defendant's behalf at a January 9, 1998 hearing. At the hearing's conclusion a trial date of April 27, 1998 was set.

At an April 8, 1998 hearing on defendant's motion to represent himself before Judge Strong the following transpired:

THE COURT: Sir, the Court notes that you've had many, many different lawyers representing you in this case, as well as lawyers who have interviewed you in an effort to be appointed to represent you in this case. At least a half a dozen or more. . . .

* * *

> THE COURT: Well, see what – see, the law says that I have to make a determination whether you can represent yourself. It's just not that you can say I want to represent myself and that's the end of it. There has to be a determination. And I have to make sure that, first of all, whether you, in fact, want to represent yourself, or is the problem that the lawyers that you have had, you just don't want.

The court denied defendant's request to represent himself after extensive discussion on the record with defendant:

> THE COURT: . . . . You're presenting the Court with a very difficult task, which is trying to get a lawyer for you because of the disagreements you keep having with them and your firing them. And this Court is just bending over backwards to make sure that you get a lawyer. I'm trying to get a lawyer for you –
>
> THE DEFENDANT: Yes, Judge.
>
> THE COURT: --because what you're telling me on the one hand, you're saying you want to represent yourself. But on the other hand, you're saying that you don't want the lawyers because you don't feel that they're representing you properly.
>
> * * *
>
> THE COURT: . . . . And the Court is certainly concerned that you have adequate representation, because it appears to this Court that your request to represent yourself is equivocal; that is, not a complete request to represent yourself. You just want a lawyer that will do what you want him to do, I think. I'm not sure. But it's clear to this Court that you want representation, so
>
> THE DEFENDANT: Yeah, if I can get right representation, sir, that would be very much appreciated, sir.
>
> THE COURT: Okay. We're going to appoint the Defender's then.

An April 17, 1998 hearing was held before then-Wayne Circuit Court Judge Brian Zahra. Defendant, who was represented by a new attorney, again requested to represent himself. Judge Zahra set a September 1998 trial date and denied defendant's request to represent himself, asking that defense counsel remain on the case. At a May 29, 1998 final conference hearing held before Judge David Kerwin, defendant stated he did not wish to be represented, the court advised him to file a motion, and a September 15, 1998 trial date was set.

Defendant's motion to proceed in propria persona was heard by Judge Kerwin on August 27, 1998. Judge Kerwin appointed advisory counsel for defendant and allowed defendant to represent himself. Defendant stated that he had motions in addition to the one to proceed in propria persona, and the following colloquy transpired:

> THE COURT: . . . . Do you want to represent yourself on those motions?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Okay.

* * *

THE COURT: Okay. And why is it that you want to proceed representing yourself?

THE DEFENDANT: I been incarcerated since December the 4th of 1996, arrested three times.

THE COURT: Yes.

THE DEFENDANT: There have been three preliminary examinations.

THE COURT: Yes.

THE DEFENDANT: And no motion has been filed of significance. Only frivolous motions.

THE COURT: All right, now here's the thing. You know, this just got put on my docket just recently.

THE DEFENDANT: Yes, sir.

THE COURT: So, we're going to have to give you some dates. And we're not going to able [sic] to proceed to trial, I don't believe on the 15th—but you're ready to go on the 15th though?

MR. AGAINSKI [*counsel for the prosecution*]: Ready to go – I'd like to go on the 15th.

THE COURT: You want to go on the 15th?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Okay, all right, here's what I'm going to do. I'm going to allow you proceed [sic] representing yourself.

I'll excuse Mr. Fenner from further representation. But I'm going to have someone else from the defender's office serve as an advisor for you. You'll represent yourself. But I want to make sure – because sometimes there are technical things that you might want to consult with somebody. I'll [sic] be your show. That's what you want; right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. But you don't have a problem with having someone serve as an advisor?

THE DEFENDANT: On standby?

THE COURT: Just as an advisor. You know, like sometimes you have a second chair. Mr. Ralston here, he gets Mr. Againski to help him on cases. It's like a second chair, we call it.

THE DEFENDANT: Yes, sir.

THE COURT: You'll be the one who'll be arguing the case, cross examining the witnesses but there might be procedural points or technical points that you'll want to ask their advice about. Okay?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

MR. AGAINSKI: Your Honor, isn't there a set of warnings you're supposed to give Mr. Jackson that it's a dangerous process. Make sure he realizes it's a tough choice, and he's has [sic] a right to make it, obviously. But aren't you supposed to make sure he's aware of the risks.

THE COURT: I – you know, I think Mr. Jackson understands that.

You know, what Mr. Againski is referring to is me advising you that – well, two things.

There's an old saying in the law that anybody who represents themselves has a fool for a client. Because there's that belief that emotionally it's better to have somebody who's not the defendant themselves [sic] representing you.

Also, in terms of the serious nature of the case, which you obviously understand that, lawyers and Judges tend to believe that representation is going to be more effective if you have an experienced lawyer representing you. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And nonetheless you would still prefer to represent yourself?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Any other inquiries?

MR. AGAINSKI: No, Your Honor, I think he understands it. And insofar as he has not been disruptive and I think –

THE COURT: (Interposing) I – hey, it's his life.

THE DEFENDANT: Your Honor, also, I would like to keep September 15th.

Defendant stated at this hearing that he wanted a bench trial. Trial began the next day.

Although Judge Kerwin failed to make a proper record, and neglected to read the charges and maximum sentences for the charged crimes, see MCR 6.005(D)(1), these omissions do not compel reversal under the circumstances. See *Adkins (After Remand), supra* at 730-731. Defendant had been informed earlier of the charges against him and possible punishment by Judge Strong. *Id.* Judge Kerwin appointed advisory counsel for defendant, advised defendant that given the "serious nature of the case" representation by an experienced lawyer would be more effective than self-representation, and noted that there was an old saying in the law that anybody who represents himself has a fool for a client. Judge Kerwin expressed the belief that defendant was aware of the risks. That defendant had requested to represent himself a number of times and had expressed displeasure with several different attorneys further supports the trial court's decision to allow defendant to represent himself. *Id.* at 725, 730-731.[1] The record shows that defendant's assertion of the right of self-representation was voluntary, knowing and unequivocal in that defendant's repeated colloquies with the various judges established that he was satisfied that the only way he would get the representation he desired was to represent himself. It was apparent that defendant would not be satisfied with any competent counsel appointed by the court. Under these circumstances, we conclude that there was substantial compliance with the requirements of *Anderson* and the court rule.

II

Defendant next argues that the trial court erred in allowing the prosecution to present the results of gunpowder residue tests, which were performed on samples taken from defendant without a warrant. We disagree.

Defendant sought to suppress the test results on the ground that they were not given to him until shortly before trial. Because defendant did not challenge the admissibility of the test results on the ground now raised on appeal, this issue is not properly preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Therefore, appellate relief is precluded unless defendant demonstrates plain

[1] While evidence of manipulation or delay does not eliminate the need to explain the hazards of self-representation, it "may serve to bolster a trial judge's assessment that a defendant knowingly, intelligently and voluntarily waived his right to counsel" *Id.* at 729-730. We are mindful that this Court should not allow a defendant to harbor error as an appellate parachute simply by asserting the right to self-representation and then arguing on appeal that the right should not have been afforded. "To permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. We would not permit it." *Adkins, supra* at 725, quoting *People v Morton*, 175 Mich App 1, 8-9; 437 NW2d 284 (1989).

error that affected his substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999); *Grant, supra*.

A warrantless search of an individual is proper where an officer has probable cause to arrest that individual, has a "clear indication" that incriminating evidence may be found on (or in) that person, and has a reasonable belief that an immediate warrantless search of the person's body is necessary to prevent the destruction of evidence. *Schmerber v California*, 384 US 757, 769; 86 S Ct 1826; 16 L Ed 2d 908 (1966) (upholding warrantless withdrawal of blood from an intoxicated defendant); see also *People v Holloway*, 416 Mich 288, 299; 330 NW2d 405 (1982) (forcible search of defendant's mouth for narcotics permissible under circumstances).

In the instant case, considering the statements of the victim and other witnesses at the scene, the police had probable cause to believe that defendant committed the shooting. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992); *People v Kelly*, 231 Mich App 627, 631-632; 588 NW2d 480 (1998). This probable cause, coupled with the knowledge that gunpowder residue remains on the skin of a person who has recently fired a firearm, provided the police with a "clear indication" that defendant's skin might contain incriminating evidence. See *Holloway, supra* at 301. Additionally, the record reveals that gunpowder residue is continuously shed with the passage of time and can be rubbed off, and generally remains detectable for only up to six hours after a shooting. Considering this window of opportunity, the fact that defendant arrived at the station approximately 2-1/2 hours after the shooting, and the fact that the arrest occurred at 12:10 a.m., the police reasonably could have concluded that the circumstances constituted an emergency such that they needed to perform the test without waiting for a warrant for fear that evidence would be destroyed or lost before a warrant was issued. Therefore, defendant has failed to show plain error with regard to the gunshot residue test results.

II

Defendant also challenges the admissibility of several statements made by the victim regarding the identity of the person who shot him. Regarding the statements made at the scene of the shooting and while the victim was in the ambulance on the way to the hospital, we conclude that the trial court did not abuse its discretion in ruling that the statements were admissible as excited utterances. The circumstances sufficiently showed that the statements were made following a startling event, were related to that event, and were made while the victim remained under the stress of excitement caused by the event. MRE 803(d); *People v Smith*, 456 Mich 543, 550, 553; 581 NW2d 654 (1998); *People v Verburg*, 170 Mich App 490, 495; 430 NW2d 775 (1988). Any error in the admission of the additional statement made by the victim while in the hospital as a dying declaration under MRE 804(b)(2) would be harmless as the trial court expressly stated that it did not find the testimony sufficiently reliable to credit.

III

Defendant also argues that prosecutorial misconduct denied him a fair trial. Because defendant did not object to the challenged conduct at trial, appellate relief is precluded absent plain error affecting defendant's substantial rights. *Carines, supra*. First, viewed in context, it is not plainly apparent that the prosecutor improperly expressed his personal belief that defendant

was guilty. Second, although we find merit to defendant's claim that the prosecutor improperly elicited evidence of defendant's silence, it is clear from the trial court's findings of fact and conclusions of law that the challenged evidence did not play a part in the trial court's decision. Therefore, defendant's substantial rights were not affected. Finally, we find no merit to defendant's claim that the prosecutor knowingly presented false evidence. Simply because testimony is inconsistent or contradictory does not render it perjured. *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972).

Next, after reviewing the circumstances of the offense and the offender, we conclude that defendant's sentence, which is within the sentencing guidelines recommended minimum range, does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

As the prosecution concedes that defendant is entitled to additional sentence credit, MCL 769.11b, we remand for modification of the judgment of sentence to reflect an additional award of sentence credit for time served. The court shall determine whether the proper credit is for 232 days or 235 days.

We affirm defendant's convictions and sentences, and remand for modification of the judgment of sentence. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Jeffrey G. Collins