STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2004
v	No. 243820 Wayne Circuit Court
STEVEN ABRAM, Defendant-Appellant.	LC No. 01-13099

Before: Talbot, P.J., Neff and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering with intent to commit larceny, MCL 750.110. The trial court departed from the minimum sentencing guidelines of zero to thirty-four months and sentenced defendant as a fourth habitual offender, MCL 769.12, to a term of thirty-six months to fifteen years' imprisonment. Defendant appealed as of right and filed a motion to remand for resentencing. This Court retained jurisdiction and remanded for resentencing. On remand, defendant's minimum sentence was adjusted from thirty-six months to the sentencing guidelines minimum of thirty-four months. On appeal, defendant argues that his waiver of his right to counsel was not unequivocal and the trial court abused its discretion in admitting hearsay evidence. We affirm.

I. Facts and Procedural History

Defendant's conviction arises out of a breaking and entering of a building in Detroit. Police officers responded to an alarm that was triggered from the building and discovered defendant standing outside the back of the property with his back against the fence. When defendant spotted the police he ran but was caught after a brief pursuit. Defendant denied that he had entered the property and told the police that he was near the property on his way to purchase beer. After the police discovered that defendant had provided them with a fake name, defendant changed his story and signed a statement admitting that he entered the back yard of the property by climbing over the fence to look for empty cans and bottles.

Defendant represented himself at trial with standby counsel. At trial, the prosecutor presented testimony establishing that two ladders were moved on the property and placed on the outside and the inside of the building at an opening in the wall for a crane. Defendant testified on his behalf, denying that he was ever on the property but that the interrogating officer coerced him into signing a false statement.

II. Standard of Review

This Court reviews for an abuse of discretion the trial court's decision to permit defendant to represent himself. *People v Anderson*, 398 Mich 361, 367; 247 NW2d 857 (1976). The decision to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

III. Analysis

A. Waiver of Right to Counsel

Defendant argues that the trial court abused its discretion by permitting defendant to represent himself at trial because his request was not unequivocal. We disagree.

"Proper compliance with the waiver of counsel procedures . . . is a necessary antecedent to a judicial grant of the right to proceed in propria persona. Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *People v Adkins (After Remand)*, 452 Mich 702, 720-721; 551 NW2d 108 (1996). Before a trial court grants a request for self-representation, the trial court must find (1) that the request is unequivocal; (2) that the assertion of the right of self-representation is knowing, intelligent, and voluntary, with the defendant having been made aware by the trial court of the "dangers and disadvantages of self-representation"; and (3) that the defendant "will not unduly disrupt the court while acting as his own counsel." *People v Ahumada*, 222 Mich App 612, 614-615; 564 NW2d 188 (1997), citing *Adkins, supra* at 722-723. Additionally, MCR 6.005(D) imposes a duty on the trial court to advise the defendant of the charge and maximum possible prison penalty he faces, any mandatory minimum sentence required by law, the risks of self-representation, and offer him the opportunity to consult with retained or appointed counsel. *Ahumada, supra*.

Defendant relies on the decision in *Adkins, supra* and *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994), and argues that because he requested standby counsel when he announced his desire to represent himself, his request was equivocal as a matter of law. In *Dennany*, our Supreme Court held that

> Because there is no substantive right to standby counsel, the trial court is under no obligation to grant such a request. Consequently, a request to proceed pro se with standby counsel – be it to help with either procedural or trial issues – can never be deemed to be an unequivocal assertion of the defendant's rights. [*Dennany, supra* at 446.]

However, this Court has recently declined to follow the plurality opinion in *Dennany* and, consequently, rejected the same argument that defendant raises on appeal. In *People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003), this Court analyzed the decision in *Dennany* and asserted that "[t]he lead plurality opinion in *Dennany* does not represent binding authority, and

we are not inclined to follow it." *Id.* at 528. Citing to *Adkins, supra* at 724-725, the decision in *Hicks* stated that "[p]ermitting defendant, equipped with the benefit of hindsight, to retract his clearly stated desire to represent himself solely because he requested standby counsel is tantamount to permitting him to harbor an appellate parachute." *Hicks, supra* at 530. Accordingly, the *Hicks* Court held that"[w]e will not disturb the trial court's discretionary decision to permit self-representation merely because defendant requested standby counsel in connection with expressing his desire to represent himself." *Id.* It must be noted here that defendant does not raise or discuss on appeal the *Hicks* decision.

In this case, defendant requested to proceed in propria persona with the assistance of standby counsel in a letter he addressed to the trial court a few weeks before trial. On the morning of the trial, defendant's counsel David Burgess informed the court that there was a break down in the attorney-client relationship and that defendant intended to file a grievance against Burgess. Burgess requested to withdraw from the case. Defendant informed the court that he did not want Burgess to represent him and he asked the court whether it received his letter in which he had requested to represent himself, as follows:

> *DEFENDANT*: I don't want him as my lawyer, sir. I wrote you. Did you get my letter that I wrote you, sir?
>
> *THE COURT*: What do you want to say, sir?
>
> *DEFENDANT*: I don't want him as my lawyer.
>
> *THE COURT*: That is not an answer. Is that all you got to say?
>
> *DEFENDANT*: There is numerous – he is lying to me. He talked to me about my defense. It is perjury although those transcripts and statements –
>
> *THE COURT*: Perjury about what?
>
> *DEFENDANT*: Those transcripts.
>
> * * *
>
> *THE COURT*: Do you want to represent –
>
> *DEFENDANT*: Myself.
>
> *THE COURT*: With standby counsel?
>
> *DEFENDANT*: Yes.
>
> *THE COURT*: You understand that there is a lot of pitfalls as far as representing yourself. You have to, one, conduct yourself in the same general way that a lawyer would in terms of the way questions are asked and things are done.
>
> *DEFENDANT*: I understand.

* * *

THE COURT: No. I am talking about – now, you understand that in doing, in representing yourself, sir, as I said, you have got to act in the same way a lawyer would. You cannot disrupt the court proceedings. You cannot inconvenience the court or burden the court, you know, with unnecessary requests and things of that nature. And like I say, there are a lot of pitfalls there. The kind of questions that a lawyer may ask, and you have to ask them in the same way, in the proper order that anyone else would do so.

You understand all of that?

DEFENDANT: I understand that it is very difficult, Your Honor.

THE COURT: Pardon me?

DEFENDANT: I understand that it is very difficult doing that but what I [sic] supposed to do?

THE COURT: Either you are going to do it or you are not going to do it. I am not going to have you equivocate about this. You want to represent yourself?

DEFENDANT: Yes, I am going to do it.

* * *

THE COURT: That is not the one. I know there were a number of cases. [*People v Adkins*] comes to mind as one of those cases that dealt with that but I wanted to make sure that we complied with the rules and that the defendant understands the pitfalls that are involved with self-representation. So, I think in asking him that based on what I have here that the questions have been asked.

We are going to – are you going to conduct the – ask questions of the jurors, too, Mr. Abram?

DEFENDANT: Yes, sir.

THE COURT: Okay, and again, I am going to – if you don't do that correctly, I am going to cut you off on that, you understand that?

DEFENDANT: Will my standby counsel be able to ask questions but only me [sic]?

THE COURT: It is going to have to be one or the other. You can get advice from him, but it is not going to be your choosing to do some things. You will have to do that one way or the other. He will be there to help you.

Okay, bring the jurors in, please.

After the jury was selected but before it was sworn-in, the prosecutor advised the court of her belief that defendant was not fully advised with respect to his waiver of the right to counsel,[1] as follows:

> *THE PROSECUTOR*: Can I bring up a little – a few more issues I don't believe that the defendant has been adequately advised as to whether or not he wanted to waive his rights. The court must advise the defendant of the charge, the maximum possible prison sentence for the court and the sentence required by law and the risk involved in self-representation prior to waiving the right to be represented by a lawyer and prior to jeopardy being attached.
>
> I would request that the defendant be advised of those, that exposure so that we can knowingly and –
>
> *THE COURT*: I am sorry. What hasn't been said that you are suggesting should be said to him?
>
> *THE PROSECUTOR*: You did say that there were risks involved, but I do not believe that he was advised once again of the charge, the maximum possible prison with the habitual offender notice and the mandatory minimum.
>
> *THE COURT*: Mr. Abram, do you understand that the charge that is made against you here that you can be put into prison up to 10 years on that and because you have a habitual fourth, if you are convicted on this, you are subject to life in prison and any number of years as a habitual fourth?
>
> *DEFENDANT*: Yes, sir.

In light of the decision in *Hicks*, we look to whether defendant unequivocally requested to waive his right to counsel. The record establishes that the trial court substantially complied with the requirements set forth in *Adkins, supra*. There is nothing to establish that defendant was hesitant or that he was merely dissatisfied with his appointed counsel's performance and was "quickly thrust into the box of self-representation by a trial court that did not first thoroughly explore the differences defendant had with his counsel," as defendant asserts on appeal. The court inquired into the differences defendant had with his counsel. Defendant stated that he did not want Burgess to represent him because Burgess would not follow defendant's argument that the transcripts in the case were perjured. While the court did not make express findings that defendant had unequivocally requested to waive his right to counsel, we conclude that the record establishes that defendant unequivocally did.

B. Hearsay Testimony

[1] It must be noted here that defendant asserts that the prosecutor's comments to the trial court occurred "mid-trial." That is incorrect. The comments were made before the jury was sworn in.

Defendant argues that the trial court abused its discretion in allowing into evidence hearsay testimony that was offered to establish that defendant entered into the building.

"Hearsay is a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is not admissible as substantive evidence unless an exception applies.

At issue is the following testimony in which the general manager of the company that owned the building that was the scene of the breaking and entry, John Formentin, stated that, following the alleged break-in, the company foremen were asked to conduct an inventory of their equipment, as follows:

> *FORMENTIN*: That morning when I got there and received notice from the president of the company who received the alarm call there was a break-in, we proceeded to notify all of the shop foreman throughout the yard and have them take an inventory of their equipment.
>
> And *word got back* from the construction steel shop which is the building that is on the eastern most portion of our property that the original alarm sounded in that there were some items moved. Ladders moved which appeared to give the burglar an in and out of the building. And it also reported that there was several grinders missing. [Emphasis added.]

We agree with defendant that Formentin was not specifically asked on the record whether he had personal knowledge of how the ladders were used to gain illegal entry into the building, and the foremen who conducted the inventory and made the report to Formentin were not called as witnesses. However, a review of the record indicates that Formentin did have personal knowledge of how the ladders were used to gain entry into the building, as follows:

> *THE PROSECUTOR*: To gain entry into that building with a ladder, could you describe for the jury what you mean by the ladder and how someone gained entry into that building?
>
> *A:* It is a large steel processing building with large overhead cranes that slide on a railway that are able to pick up the steel because their operation is both inside the building and outside of the building.
>
> The crane passes through an opening approximately four feet tall at the top of the building which allows the crane to slide in the building and outside of the building. On that opening, we have probably a six-inch wide plastic slate like you would see in a meat locker to try to keep the elements out of the building, but still allows the crane to pass through.
>
> There was a wooden ladder . . . a couple hundred yards away from that building that had been moved over to that building to gain access in and then a fiberglass ladder that was stored in the back of that building was brought to the front.

The above testimony indicates that Formentin had examined the ladders that were placed at the inside and outside of the building at the crane opening and that he had personal knowledge of the type of ladders used and their original storage place and how they were used to gain entry into the building. Further, Detective Donald Oehmke testified that he investigated the scene and that Formentin accompanied him to the area of entry and he actually saw the two ladders placed against the outside and inside wall of the building at the crane opening. Therefore, a review of the record indicates that both Formentin and Oehkme both had actual knowledge with respect to how the perpetrator used the ladders to gain entry into the building. Additionally, the gist of defendant's argument on appeal is that there was no actual or physical evidence placing him inside the building. It should be noted here that Detective Oehkme testified on cross-examination that defendant made a statement that he was in the building, but that Oehkme did not write down the statement for defendant's signature because defendant refused to allow Oehkme to do that. Accordingly, even if Formentin's statement that "word got back" from the foremen that two ladders were used in this case could be considered hearsay, it was cumulative of other testimony.

Defendant's final argument on appeal, that the trial court departed from the guidelines without articulating any substantial and compelling reasons, is now moot. This Court had remanded the case to the trial court for resentencing, and the trial court resentenced defendant within the minimum sentencing guidelines. Defendant has not filed a supplemental brief to challenge the amended sentence and, in fact, included a request in his motion for oral argument that we disregard this issue. Accordingly, we do not address the issue originally raised on appeal.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio