STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2004
v	No. 250610 Berrien Circuit Court
ANTHONY TERRELL MCGOWAN, Defendant-Appellant.	LC No. 2002-404276-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of one count of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced by the trial court to ten to fifty years' imprisonment for the armed robbery conviction, to be served consecutively to a two-year sentence for the felony firearm conviction. We affirm.

I

Defendant first contends that the trial court violated his constitutional and statutory rights by summarily rejecting his request for self-representation. Defendant further argues that the trial court failed to comply with the requisite waiver of counsel procedures.

The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of counsel for his defense." US Const, Am VI. The United States Supreme Court has held that the Sixth Amendment right to counsel also implies the right to self-representation. *Faretta v California*, 422 US 806, 821; 95 S Ct 2525; 45 L Ed 2d 562 (1975). In Michigan, the right of self-representation is explicitly recognized by our constitution and by statute. Const 1963, art 1, § 13; MCL 763.1; *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996), overruled in part on other grounds by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004). However, a defendant cannot exercise both his right to self-representation and his right to counsel; he must choose one or the other. *Id.*; *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994) (Opinion by Griffin, J.); *People v Hicks*, 259 Mich App 518, 527; 675 NW2d 599 (2003), lv pending ("there is no substantive right to hybrid representation and . . . the trial court is under no obligation to grant a request for standby counsel"). Because self-representation involves foregoing the right to counsel, a defendant must knowingly and intelligently waive his right to counsel before being permitted to represent

himself. *Faretta, supra* at 835. "The defendant must exhibit 'an intentional relinquishment or abandonment' of the right to counsel, and the court should 'indulge every reasonable presumption against waiver' of that right." *Adkins, supra* at 721, quoting *Johnson v Zerbst,* 304 US 458, 464; 58 S Ct 1019; 82 L Ed 2d 1461 (1938). See also *Williams, supra* at 641. A defendant may only enter into self-representation "with eyes open," aware of the dangers of acting as his own counsel. *Adkins, supra* at 725.

The scope of judicial inquiry required to effectuate a valid waiver was explained by this Court in *Hicks, supra* at 523:

> "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 706, 722; *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976). Additionally, MCR 6.005 imposes a duty on the trial court to inform the defendant of the charge and penalty he faces, advise him of the risks of self-representation, and offer him the opportunity to consult with retained or appointed counsel. *Ahumada, supra* at 614-615. These requirements are "vehicles to ensure that the defendant knowingly and intelligently waived counsel with open eyes." *Adkins, supra* at 725.

See also *Williams, supra* at 642-643.

The trial court does not have to engage in a strict litany approach in giving its advice concerning self-representation. *Adkins, supra* at 725, 727. Rather, a court must substantially comply with the advisory requirements, engage "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." *Id.* at 726-727. See also *Dennany, supra* at 439. Where the court has already expressed the nature of the charge and possible punishments to the defendant at his arraignment, "[t]he fact that the judge did not specifically address the charged offense and the range of possible punishment is not enough to defeat a finding of substantial compliance with the waiver procedures . . . ." *Adkins, supra* at 731. "[T]he effectiveness of an attempted waiver does not depend on what the court says, but rather, what the defendant understands." *Id*. at 723.

"We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Russell, supra* at 187. See also *Williams, supra* at 640-641; *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). "[T]he reviewing court is not free to simply substitute its view for that

of the trial court, but must be careful to respect the trial court's role in determining factual issues and issues of credibility." *Williams, supra* at 641.

In the instant case, the record reflects that, throughout his trial, defendant was represented by counsel. However, immediately prior to closing arguments, defendant made the following request:

> THE COURT: We're continuing with the Anthony Terrell McGowan case. We're outside the presence of the jury.
>
> Mr. McGowan, you wish to make a request?
>
> THE DEFENDANT: Yes. I would like to file a motion to proceed (indistinct) for the further of this case – for the rest of this case, your Honor.
>
> THE COURT: You mean – what you're telling the court, you would like to make the closing argument yourself.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Well, why did you wait until this – just a few minutes before we're beginning closing arguments to make this request?
>
> THE DEFENDANT: Because I thought this was the appropriate time, your Honor. We was going through other things as well, and I thought one thing at a time. So I just –
>
> THE COURT: What experience have you had in making any closing arguments before?
>
> THE DEFENDANT: None, your Honor.
>
> THE COURT: Why do you think you're –
>
> THE DEFENDANT: I –
>
> THE COURT: -- qualified to make it today?
>
> THE DEFENDANT: Due to the fact I do have a very good memory in what the testimony that the state witness has brung about, I can, you know, present that to the jury, you know. I'm not saying I can do it better than Mr. Whatchacallit, but he got issues, and he got – well, he got formabilities [sic] that – things that he cannot bring up during the jury to my understanding. That's what he told me.
>
> THE COURT: Well –
>
> THE DEFENDANT: You know –

> THE COURT: That's right. There are certain rules of procedure that have to be followed. And he's versed in, and he's done a good job in representing you so far. Do you agree with that?
>
> THE DEFENDANT: To a certain extent, yes.

Defense counsel then indicated that although he was willing and prepared to go forward, and "[i]t would probably be better if I did it," he had no objection to defendant's request. Upon further questioning by the court, defendant stated that he had a twelfth grade education and had never studied law. The court then denied defendant's motion, stating:

> I believe, and I'm ruling that in my discretion you are not going to make a final argument in this case. You have had an attorney who's represented you right from the beginning, through the preliminary examination, through pretrial discovery and motions. And I believe that he's qualified. He's asked extra time and I've given him that to prepare for his final argument. And I deny your motion. All right.

Here, the above record reflects that the trial court engaged in a brief dialogue with defendant concerning self-representation and its consequences before denying his request. When viewed in context, the court's inquiry, albeit meager, was sufficient to ascertain that defendant's last-minute request to represent himself was neither unequivocal nor knowingly and intelligently made. Defendant did not express dissatisfaction with the performance of his attorney, and the record is not clear whether defendant wanted his attorney discharged. Indeed, defendant never expressed an unequivocal demand to discharge his attorney. Under such circumstances, a defendant cannot exercise both his right to counsel and his right to self-representation, but must choose one or the other. *Hicks*, *supra* at 527. As our Supreme Court explained in *People v Russell*, 471 Mich 182, 193; 684 NW2d 745 (2004):

> [T]o the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding defendant's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with *Adkins* and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel. [Emphasis in original.]

Moreover, defendant's stated reasons for wanting to represent himself were vague and inarticulate and certainly did not reflect a clear understanding of the proceedings or the court's advice concerning those proceedings. Defendant seemed to believe that if he, rather than defense counsel, presented the closing argument to the jury, he could touch upon evidentiary matters otherwise precluded by the rules of procedure. Finally, as the trial court noted, defendant's request to represent himself was made immediately before the parties' closing arguments were scheduled to begin, and after defense counsel had asked for and been granted extra time to prepare for closing argument. The disruptive potential of defendant's request was implicit in the trial court's denial of defendant's request for self-representation. See *People v Rice*, 459 Mich 899; 589 NW2d 280 (1998) ("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."). Under these circumstances, we conclude that the trial court did not clearly err in denying defendant's request for self-representation.

"If a judge 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. The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate." *Adkins, supra* at 727.[1] "[A]lthough the right to counsel and the right to self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, 'is the standard, not the exception,' in the absence of a proper waiver." *Id*. at 189-190 (citation omitted). Under the present circumstances, we conclude that the trial court did not commit error requiring reversal when it denied defendant's request to represent himself in the final stage of his trial.

II

Next, defendant contends that the trial judge pierced the veil of judicial impartiality and exceeded his judicial mandate when he told the jurors, prior to the start of continued deliberations, that the fact that Christ's disciples were ordinary men from all walks of life should give them confidence in what they were doing. Defendant argues that the court's comments improperly introduced religion into the trial, and quite possibly could have signaled to the jury that convicting defendant was the right thing to do, thereby denying defendant a fair trial.

However, the court's remarks, when viewed in context, do not provide grounds for the reversal of defendant's conviction. The third day of trial consisted of continued jury deliberations and the verdict. Before sending the jury to continue their deliberations, the trial court made the following comments:

> Driving to work today I was thinking of G.D. Chesterton. He's a – he was an English author, novelist, somewhat of a theologian, but a philosopher, and also wrote mysteries. And he said something that I thought was important. He said if we wanted to discover mysteries of the universe, we go to our scientists, our experts in the field.

[1] More recently, the *Russell* Court noted:

> Under *Adkins*, if the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. In addition, the rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel. [*Russell, supra* at 191-192.]

> But he said for something like determining the facts of a case, to determine truthfulness, credibility or what goes on in the human heart and mind and soul and people are judged by their actions, we turn to 12 ordinary people from all walks of life. And we entrust them with that awesome decision because we believe that they are capable, based upon their experiences, to make these decisions. And I thought it was so interesting, because he said we can look into history to find that that happened once before. He said look at Jesus Christ's disciples. Who were they? Just 12 ordinary men. Probably today it'd be men and women, but 12 ordinary men who were not the well educated people of the time. They weren't scientists. They weren't doctors or priests or rabbis, but just fishermen, tax collectors, whatever – whoever else that they – just ordinary people just like you are.
>
> So I think that that's [sic] should give you confidence too in what you're doing.
>
> All right. We're going to let you continue your deliberations. And then if you have any questions, just let us know and we'll try to answer them.

Initially, we note that defendant failed to object to the above comments at trial. We therefore review this unpreserved claim for plain error affecting defendant's substantial rights, i.e., the error was outcome determinative. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). A reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764, 774.

"A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct." *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995). Generally, "[t]he appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988) (citation omitted); see also *Paquette, supra* at 340-341. "Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *Id.* at 340.

Here, when the trial court's comments are viewed as a whole, it is clear that the trial court's reference to the twelve disciples was not made for the purpose of injecting religion into the case, but simply to make the point that the disciples, like the twelve jurors, were ordinary people, and ordinary people are capable of deliberating and making difficult decisions. The error, if any, in the trial court's comments was harmless. Defendant has failed to show plain error affecting his substantial rights with respect to this unpreserved issue. *Carines, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello