# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 20, 2010 |
| v | No. 289417<br>Calhoun Circuit Court |
| MICHAEL RICHARD JACKSON,<br><br>Defendant-Appellant. | LC No. 2008-001849-FC |

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), two counts of assault with intent to rob while armed, MCL 750.89, four counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of firearm, MCL 750.224f. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to ten to 30 years' imprisonment for home invasion, 15 to 35 years' imprisonment for each of the two counts of assault, two years' imprisonment for each of the four counts of felony-firearm with credit for 210 days, and 24 to 90 months' imprisonment for felon in possession, with the sentences to run concurrently, except for the sentences for felony-firearm, which are to run concurrently with each other but consecutively to the other sentences, and the sentence for home invasion, which is to run consecutively to the sentences for assault and felon in possession. We affirm.

This case arises out of an April 25, 2008, incident wherein defendant and a cohort broke into the home of Shaketta Patterson while her friends Danielle McCord and Keedra Cooper were visiting and robbed the victims at gunpoint.

Defendant argues that there was good cause for the trial court to appoint substitute counsel because defense counsel was disinterested in defendant's case and merely wanted him to plead guilty to the charges. In addition, he claims that the appointment of substitute counsel would not have unreasonably disrupted the judicial process. "A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). In *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988), the Court explained:

> An indigent defendant is constitutionally guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by

> requesting that the attorney originally appointed be replaced. 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 as to a fundamental trial tactic. [Citations omitted.]

Inadequacy, lack of diligence, or disinterest on the part of the lawyer can also establish good cause. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973).

In this case, our review of the record supports that defendant did not articulate a legitimate difference in opinion with regard to a fundamental trial tactic. See *Jones*, 168 Mich App at 194. Defendant also did not establish that defense counsel was inadequate, lacked diligence, or was disinterested in defendant's case. See *Ginther*, 390 Mich at 441-442. Rather, defendant's unhappiness with defense counsel appeared to stem from the fact that defendant's plea agreement, in a previous case, was not precisely what he thought it would be and also from the fact that defendant was incarcerated for a year after he chose to violate his probation in that case. We find that defendant being disgruntled regarding the events that transpired in his previous case does not result in a finding that defense counsel was inadequate, lacked diligence, was disinterested in this case, or disagreed with defendant regarding a fundamental trial tactic. Defendant also appeared to be unhappy with his defense counsel because he did not feel "safe" with defense counsel representing him where defense counsel suggested that defendant accept the plea agreement. However, a "defendant's mere allegation that he lacked confidence in his trial counsel is not good cause to substitute counsel." *Traylor*, 245 Mich App at 463. Thus, defendant's assertion that he did not feel "safe" with defense counsel does not support a finding that there was good cause to appoint substitute counsel. See *id*. Also, defense "[c]ounsel's responsibility is to provide the defendant the requisite information to allow the defendant to make an informed decision whether to plead guilty." *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995). Thus, defense counsel's suggestion that defendant accept the plea agreement appears to reflect that defense counsel was properly executing his duty by making a recommendation to defendant after defense counsel had assessed the case. Moreover, as expressed by the trial court, "[t]he ultimate decision to plead guilty is the defendant's, and a lawyer must abide by that decision." *Id*., citing MRPC 1.2(a). Thus, regardless whether defense counsel suggested to defendant that he should plead guilty, defendant was required to make the ultimate decision. See *id*. In addition, defendant also appeared to be unhappy with his defense counsel because, according to defendant, defense counsel did not listen when defendant tried to explain that he wanted to go to trial because there was a lack of physical evidence to support a conviction. However, we find that defense counsel was merely trying to explain to defendant that fingerprints and deoxyribonucleic acid are not required to support a conviction. Moreover, defense counsel appeared to try to explain to defendant that, in his opinion, there was sufficient evidence for a jury to find defendant guilty of the crimes based on the eyewitness identifications and other highly incriminating evidence, including the police finding one of the victim's wallets on the floorboard of the vehicle defendant was driving moments after the crime. Finally, defendant also argues that defense counsel's failure to listen to defendant became evident after jury selection when defense counsel untimely requested to add three witnesses to his witness list, which the trial court denied. Importantly, however, defendant does not argue that his trial counsel was ineffective or offer any evidence as to what the witnesses would have added to his

defense. Defendant only argues that the trial court abused its discretion by not appointing substitute counsel, and we disagree.

Defendant did not establish that his counsel was inadequate, lacked diligence, was disinterested in defendant's case, or disagreed with defendant regarding a fundamental trial tactic. See *Ginther*, 390 Mich at 441-442; *Jones*, 168 Mich App at 194. Consequently, based on the record, we find that defendant did not show good cause warranting the appointment of substitute counsel. Thus, the trial court did not abuse its discretion by denying defendant's request. See *Traylor*, 245 Mich App at 462. Because good cause was not established, it is irrelevant whether defendant requested substitute counsel far enough in advance to not unreasonably disrupt the judicial process. See *Jones*, 168 Mich App at 194.

Defendant next argues that the trial court's summary rejection of his request for self-representation was clearly erroneous. 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 statute, Const 1963, art 1, § 13; MCL 763.1. *People v Kevorkian*, 248 Mich App 373, 417; 639 NW2d 291 (2001). However, this right is not absolute. *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976). Four findings must be made by a trial court before making a determination that a defendant can represent himself at trial. *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004). The Court in *Russell* set forth the first three requirements as follows:

> Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Id*. at 190.]

The fourth requirement requires a trial court to comply with the pertinent portions of MCR 6.005(D). *Id.* at 190-191. The trial court need only substantially comply with the four requirements outlined above, and if the court is uncertain regarding whether any of the waiver procedures are met, it "'should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record.'" *Id*. at 191, quoting *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), abrogated in part on other grounds by *People v Williams*, 470 Mich 634, 641 n 7; 683 NW2d 597 (2004) (emphasis omitted).

> Although engaging in a de novo review of the entire record . . . , this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of [Sixth Amendment] rights unless that ruling is found to be clearly erroneous. Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment.
>
> Although we review for clear error the trial court's factual findings regarding a defendant's knowing and intelligent waiver of [Sixth Amendment] rights, . . . the meaning of knowing and intelligent is a question of law. We review questions of law de novo.

> Thus, the 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*, 470 Mich at 640-641 (internal quotation marks and citations omitted).]

We find on the record before us that defendant's request to represent himself was not unequivocal. Defendant's request appeared to be made in the alternative, or as the trial court noted, conditionally. The condition was the trial court's determination whether defendant could receive substitute counsel. At the pre-trial status conference that took place after the trial court had denied defendant's request for the appointment of substitute counsel, defendant informed the judge that he was rejecting the prosecution's plea offer, and indicated that when his attorney told him about the offer, "I'm like nah, I would rather—I would feel better if I represent myself at trial, and I will do that." Defendant immediately continued, "[w]e have money for another trial—for another—we have money for a lawyer and we can get some more money, so you know, I would like for you to please accept my request to go to trial, cause I—he's not representing me to the best of his ability, and there's evidence and I have somethin' to say when I go to trial about what—what—what happened, and what's goin' on." Given these statements and similar ones defendant made at the time his request for the appointment of substitute counsel was denied, defendant appeared to be more desirous of going to trial with a substitute appointed attorney or his own retained attorney rather than to actually represent himself at trial. In addition, we find that the record does not provide a basis for concluding that defendant's request for self-representation was knowingly and intelligently made. Consequently, we find that the trial court correctly denied defendant's request for self-representation because every reasonable presumption should be against waiver and two of the four elements for waiver were not met. See *Russell*, 471 Mich at 191-192.

Defendant lastly argues that the trial court erred in assessing offense variable (OV) 8 at 15 points because the victims were not asported to another place of greater danger. MCL 777.38(1)(a). A trial court's calculation of the recommended minimum sentence range under the legislative guidelines is reviewed to determine "whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The record evidence in this case supports the trial court's finding that Cooper, Patterson, and Patterson's baby were asported to another place of greater danger or to a situation of greater danger. See, e.g., *People v Hack*, 219 Mich App 299, 313; 556 NW2d 187 (1996); *People v Piotrowski*, 211 Mich App 527, 529; 536 NW2d 293 (1995). As defendant and his cohort entered the house, the victims entered the baby's bedroom. Patterson and her baby hid in the closet, McCord hid by the changing table, and Cooper tried to hold the bedroom door shut. The bedroom door was pushed in and Cooper was taken into the living room at gunpoint. As she was being moved from the bedroom to the living room, Cooper tried to walk toward the back door, but defendant's cohort saw her and said, "Don't move or I'll blow your—your back out bitch." Cooper was robbed and forced to lie on the floor on her stomach. Patterson and her baby were removed from the bedroom closet and forced at gunpoint into the hallway, where Patterson was required to sit because she could not

lay on the floor while holding her baby.[1] In being removed from behind the closed door of a bedroom, separated, forced onto the floor, and held at gunpoint, the victims were placed in situations of greater danger. Because "[s]coring decisions for which there is any evidence in support will be upheld," *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996), we find that the trial court did not abuse its discretion by scoring 15 points for OV 8.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[1] McCord remained hidden by the changing table.