STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2012
v	No. 302146 Wayne Circuit Court
WILLIE BERNARD WRIGHT, Defendant-Appellant.	LC No. 10-007622-FC

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Willie Bernard Wright of one count of kidnapping, MCL 750.349, three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), two counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, for his actions in holding an acquaintance hostage, forcibly raping her, and shooting her as she escaped. Defendant challenges the lower courts' denials of his requests for substitute appointed counsel and the circuit court's decision to proceed with reinstructing the jury and taking the verdict in defendant's absence. Defendant failed to establish good cause supporting his request for substitute counsel. Defendant further waived his right to be present by refusing to attend court on the day of his verdict and suffered no prejudice as a result of his absence. Accordingly, we affirm.

On October 2, 2009, the victim telephoned defendant and asked if he would give her $20. The victim had known defendant for approximately one year at that point and admitted that she had engaged in consensual sexual intercourse with him on one prior occasion to thank him for taking her shopping. The victim did not intend to exchange sex for cash on October 2, but defendant had other ideas. The victim testified that defendant trapped her in his truck and then choked and punched her. Defendant drove the victim to his house, took her inside, forced her to perform fellatio on him, and then forcibly raped her twice. Afterward, defendant forced the victim to clean her vaginal area, restrained her with duct tape, and injected her with drugs until she fell asleep. When the victim awoke, defendant agreed to take her home if she promised to tell no one of the incident. On the route to the victim's house, the victim noticed a vehicle owned by her brother's girlfriend parked outside a residence. In the hope that her brother was in the area, the victim asked defendant to stop at a local store, claiming she wanted to buy a cigar to calm her nerves. Defendant allowed the victim to enter the store alone and she used the store's

phone to call her brother. The victim's brother came quickly, the victim jumped into his vehicle, and the pair drove away with defendant in pursuit. Defendant shot toward the other vehicle, breaking out the rear window and grazing the victim's head. To stop the chase, the victim's brother veered his vehicle in the path of an ambulance, purposely causing a collision. Defendant drove away.

Defendant asserted that he engaged in consensual sexual relations with the victim on October 2, 2009, and that he did not possess a gun that day. The jury disbelieved his defense and convicted defendant as noted above. He is now serving six concurrent 35-to-60-year sentences along with a two-year consecutive term.

I. SUBSTITUTE COUNSEL

Defendant contends that the trial court denied his right to the effective assistance of counsel by refusing his pretrial request for substitute appointed counsel. Throughout the lower court proceedings, and in a separate breaking and entering criminal proceeding that occurred during the same period, defendant was represented by James A. Parker. Defendant first raised his dissatisfaction with appointed counsel at the July 21, 2010 preliminary examination before District Court Judge Donald Coleman:

> *Mr. Parker.* He is saying that he is not happy with his representation at this point in time.
>
> *The Court.* Are you otherwise prepared to proceed to the examination Counsel?
>
> *Mr. Parker*. I'm ready to proceed today.
>
> * * *
>
> *The Court.* All right. What do you wish to tell me at this time?
>
> *The Defendant.* When I was talking to my Attorney, Mr. Parker, I was explaining I had used him on another case the other day, and we talked. He came yesterday to visit me, . . . I told him I'm not comfortable with him on this particular case. I was asking could I get another attorney for this, this present case. I used him on the other one, I seen his methods and everything, I'm not comfortable with him on this particular case, so I was asking the Court . . . if they can appoint me another attorney. . . . Mr. Parker is a good person and everything and like I say, I've seen him in action, but this particular case, no, I don't really want him for this particular case.
>
> * * *
>
> *The Court.* All right. Well, Mr. Parker has practiced before this Court for many years. He has been approved to handle capital cases and cases that have significant entry, significant issues and all kinds of charges. I don't see any reason as presented why he can not proceed with regard to this matter. I don't

find that there is any breakdown in the attorney client relationship. I believe that he would be open to any communications, suggestions, etcetera that might be offered by [defendant].

And more, will [sic] I believe that Mr. Parker has together with his connection to this Court system, the Defender's Office etcetera, sufficient tools and sufficient relationships whereby he can certainly offer an offense [sic] that is required by law, that he can offer a Defense that would raise the issues that need to be raised and protect the rights of [defendant] during these proceedings. For that reason, I'm going to deny the request to substitute a new attorney into this matter, and I'll allow [defendant] to proceed.

Defendant next raised his concern with appointed counsel's representation at the September 17, 2010 final conference before Wayne Circuit Court Judge Michael M. Hathaway:

Defendant. . . . [S]ince Mr. Parker came and visit [sic] me up there at the Wayne County Jail, we talked one minute.

And, you know, after he left, I start to thinkin', . . . I don't feel he's sufficient for me.

What I mean by that is this: . . . I feel that since, was today's date for motions, and different things should be filed.

* * *

The Court. Well, what do you think should have been filed?

Defendant. . . . I'm tellin' him about . . . the incident that's alleged happen, . . . at my house, kidnapin' [sic], and all this stuff.

I say, this is ten months old. Police never came to my house.

It's just a lot of issues I have that, in the discovery, and in the actual report. I was goin' through it, . . . I was tellin' him that.

Just a lot of stuff . . . that should have been filed, that was goin' on.

The Court. What? What should have been filed?

Defendant. Like, for example, the kidnapin' [sic]. They got me down there . . . they hollerin' about felony firearm.

They hollerin' about different things.

I was tellin' them, I was 'splainin' to them in the jail, they, they not tellin' the truth, everything that goin' down, that went down.

And I'm 'splainin' to 'em, I say - -

The Court. Who, the Police, or the victim, or who?

Defendant. The victim itself. I know them from over like fifteen years.

The Court. Okay.

They're not telling the truth?

Defendant. They're not tellin' the whole truth.

The Court. That's what trials are for.

Defendant. Right.

The Court. Mr. Parker can't file a motion saying that the victims aren't telling the truth.

Defendant. No. I was sayin' . . . some of the charges, I think, they got like charged I think shouldn't be there.

The Court. Okay.

Defendant. And I was explaining to him, like, I said, the victim's sittin' there sayin' . . . I didn't have a gun, then they say I did have a gun.

I was just explainin' to 'em - -

The Court. Well, . . . they said you had a gun, well, then they charge you with a gun.

Defendant. Then . . . in the report, they say I didn't have a gun.

Then they wasn't bein' truthful, they wasn't bein' truthful on what I was drivin'.

There's a lot of things I'm talkin' to Mr. Parker about. I just don't feel comfortable - -

The Court. All right.

Well, I've given you a chance to tell me what motions you think Mr. Parker should have filed, that he didn't file - -

Defendant. Well, the motions for, what do they call it, somethin' to get rid of some of them charges that was there.

The Court. Well, if the preliminary exam transcript contains anything at all - -

Defendant. Uh-huh.

The Court. To support the charge - -

Defendant. Okay.

The Court. Then you can't get the charge dismissed.

Defendant. Okay.

The Court. I mean - -

Defendant. Discovery?

The Court. If they whisper - -

Defendant. I was askin' about the discovery only.

The Court. What discovery? That's a different issue.

Defendant. Okay. Right. That's why I was, I was - -

The Court. You understand that, right?

Defendant. Well, I'm not fully into a lot of law things, but I was just, you know, feelin', that we was gonna go straight to trial, and not challenge anything.

The Court. That's what the trial is for, to challenge the charges.

* * *

The Court. That's just, you know, hey that's just the way it is.

It, it - - this is what they're gonna say, and that's what the evidence is, there it is.

Parker can file a hundred and fifty motions.

It doesn't make any difference at all.

* * *

The Court. There's only reasons, or certain kind of motions that can be filed before a trial.

And Mr. Parker knows what they are. He knows what he's doing.

And, and there has to be some basis for the motion.

It's not just, file a motion, file a motion, file a motion, and the charge is thrown out.

You can't - - that's not the way this works.

Defendant. . . . There's just certain things - - everything wasn't put to me . . . . [F]or example, no disrespect to Mr. Parker, like, when I retained Mr. Slameka all the time, he sit there, he put it out, he explained what - - which way we gonna do, what you gonna do.

The Court. Well, you'd rather have Slameka?

Defendant. I had twenty years, twenty years.

The Court. When's the last time you had him?

Defendant. I had Slameka - - that long before you. Thirteen years ago.

And - -

The Court. I think we better just keep Mr. Parker on this case.

Defendant. Oh. You don't like Slameka?

The Court. No, he's fine.

Defendant. Okay.

I feel a lot comfortable with him.

The Court. Well, you know, the other problem is, that your trial is coming up here on November 1st, and that's only six weeks away.

Defendant. Right.

The Court. You don't want me to give you a new lawyer six weeks before - -

Defendant. I haven't seen him, though.

The Court. CSC - - yeah, you haven't seen him in a long time.

I mean, I would be doing a disservice by - -

Defendant. No, I'm talkin' about Parker. I haven't seen him, you know, the time he came, twice since then. That's what I'm sayin'.

The Court. How many times do you need to see him?

Defendant. Well, I thought if I had some questions, or something, I thought attorney be, I thought, would be really available to you.

This is new to me, here, as far as comin' this far along this - - other things goin' on. I ain't never been to this, in this before.

The Court. Mm-hmm.

Defendant. This is all new to me. I don't know nothin' about - -

The Court. What did you have Slameka for, a civil case or something?

Defendant. No, I had Slameka for, before, I think, last time I had a property crime.

The Court. Well, anyway, Mr. Parker's your lawyer now.

You haven't given me one solid decent reason why I should switch lawyers.

And moreover, you're six weeks away from trial.

And it's usually not a good idea to put a new lawyer on a case just six weeks before trial, anyway.

And, of course, you know, busy lawyers are usually not available just six weeks down the road.

So, Mr. Parker has tried a lot of cases in this courtroom. He knows what he's doing.

Defendant. I mean, I trust you with that.

At the outset of the jury trial on November 1, 2010, defendant again asserted his desire for new appointed counsel:

Defendant. . . . I sit there now for the third time I asked . . . my attorney. We talked a few times. We - - the time we do talk I tried to dismiss him again. I'm still trying to dismiss him because I felt that back and forth, again, we not seeing eye-to-eye. And we talk back there just a few minutes ago. He was saying the same thing, he wish he was tooken [sic] off the case, but unfortunately he didn't was tooken [sic] off the case.

I told him . . . he's not working for me. We not seeing eye-to-eye and I want a different attorney. . . . [T]his been going on since 36th District Court. I talked to him all the way up to now.

I talked . . . to him Thursday and Friday. . . . I talked to Defender's Officer [sic]. I told them I didn't want him.

. . . I asked him about going to chief judge to find out why I couldn't. For some reason why it's so hard to dismiss him. I said because he's not working for me.

I called . . . the Judge's clerk, I believe it's Gray for the Chief Judge trying to, you know, get a resolution of this. He's not working for me. I mean I don't know what's so hard for me getting a new attorney.

I tried then when I talked to you back in I think it was conference time. I said the same thing. . . . [T]his been going on since 36th District, you know.

* * *

The Court. What specifically do you claim Mr. Parker should have done for you that he hasn't done?

Defendant. Mr. - -

The Court. How is he, quote, not working for you?

Defendant. Well, . . . from the word go, . . . let's say from 36th District when I asked him on certain things I wanted him to do far as before we got into . . . the 36th District preliminary exam. I asked for certain thang [sic], wanted certain thangs [sic]. We're not seeing eye-to-eye.

The Court. What things?

Defendant. Well, me and him talked about certain things as far as attorney/client.

The Court. What do you claim that Parker should have done for you that he hasn't done?

Defendant. Okay. We bring it up here. I asked him about motions.

The Court. What motions?

Defendant. . . . I asked him a motions [sic] as far as evidentiary hearing. I asked him about certain things about ballistics. I asked him about certain things.

Everything I asked him when I do see Mr. Parker does not - - we don't see eye-to-eye on, your Honor. That's what I keep saying. I'm - -

The Court. What motion do you think he should have filed?

Defendant. Oh, yes. It's a few motions. I'm surely not - - I mean something should have been filed except none.

The Court. What?

No, no. Lawyers can't just file motions for the heck of it.

Defendant. Oh, I know that.

The Court. There has to be a basis for a motion.

Defendant. I know that.

. . . From the word go if I asked him, you think you guilty, and they - - he pretty much tell you that from the word go. And I tried to fire him three times. There's no way in God's green earth I'm gonna feel he gonna defend me to the, to the utmost. Same thing now back there in the back.

The court proceeded to explain the severity of the charges and sentences defendant faced and the fact that the victim and her brother intended to testify against him.

Defendant. That's why I asked him. That why I told him in the back, I asked why I felt the courts was biased towards him because for the simple fact . . . when I said that it's because from 36th District pretty much what you repeated is the same thing pretty much what he repeated, you know. . . . I said why is it so hard to fire an attorney when I feel he's not working in the best interest of me.

The Court. Yeah. But you, you just used those sort of generalities, he's not working in the best interest. I need specifics.

Defendant. Okay. He - -

The Court. I do terminate lawyers from time to time.

Defendant. Right.

The Court. I don't do it now on the morning of trial - -

Defendant. Okay

The Court. - - obviously.

But, you know, I'll take a lawyer off a case and assign another lawyer if there's some specific objective problem that I think - -

Defendant. Um-hum.

The Court. - - has arisen. The lawyer literally has not done something that he should of done.

Defendant. . . . I have sit there and from when you said it last time when like I said it started from 36th District Court. The last time I talked to you . . . at pre conference and I brought the issue back up again. You said the same thang [sic]. And . . . I tried to work with him. . . . [W]hen he come down there and he

talked to me, it's just like whatever I say is like you look up in the sky. He's not working for me. I asked him back in the back the same.

The Court. Well, maybe he really is working for you.

Defendant. No, he - - no.

The Court. He's trying to get you to see the light of day.

Defendant. Well, I'm seeing the light of day.

The Court. You don't want to see it.

Defendant. No. It's this here. If I'm sitting right here and I feel in a case like this I need the best representation and I'm telling you that my attorney is not working for me, which me and him is talking about my case and he tells me, and he just back in the back ain't really paying attention to me, ain't saying at the last minute I asked him about certain aspects of the case, I didn't investigate this, I didn't investigate that, that is an individual that's not working for me.

The Court. Well, investigate what?

Defendant. I can't really say in here because it's - -

The Court. You can't say.

Defendant. - - client/attorney. You know, client/attorney. . . . I don't want to just put it out in the courtroom.

* * *

Defendant. That's what I'm trying to tell you, your Honor. I'm sitting here. He come, he stay five, ten minutes, he's gone. Good grief. Ain't nobody sitting. . . . [A]in't nobody trying to work with me. Nobody trying to say nothing. That's why I said what is so hard for me to sit there and have the court appoint me another attorney.

I'm just - - all I'm asking for something fair. I'm not asking for no, no special privilege, no nothing. He's not doing anything for me. That's what I'm trying to keep telling the Court. . . . I said that this the third time on the record.

The Court. Right. Well, I know you just - - but you keep repeating the same generalities over and over. I have no reason - -

Defendant. It's a conflict.

The Court. . . . I have no basis to conclude that Mr. Parker has ineffectively represented you at any stage of the proceedings up to this point.

And you're making the decision. You want to go to trial, that's fine. You go to trial.

You know what the offer is. You want to reject the offer and roll the dice, fine. You know what the evidence is gonna be. It's gonna come in and you're gonna have to just sit there and listen to it. And there's isn't [sic] anything Mr. Parker could do to stop the evidence coming in.

And then when it's all over, the jury will make its decision. And if that's what you want, then that's what you get.

Defendant. Well, I'm still - -

The Court. . . . I'm not going to unappoint Mr. Parker and appoint somebody else not having any objective basis to do so without having something specific.

Defendant. Okay. You got specific like this. . . . Friday I sit there and we talk about my, my witness. I sit there and ask him did you call, did you call the people. And generally, yeah, I called them.

As soon as I get, finally get a phone call and call and find out, no, he never called them. He never did anything to the fact. Like I keep trying to, I keep trying to explain. I'm kind of tied for words in my mouth. But he is not working for me.

Me and him is, is talking. Not the courtroom, not anybody else. Me and him is - -

The Court. You have a witness.

Defendant. Me and him, one-on-one.

Yeah. I got a witness. That is the first thing he telling me was they gon' be there or I asked him did he call. He say he left a voice mail. . . .

The Court. Okay.

Defendant. I said did they call? No, he never called. That mean he been at there, at the jail when you sit there and ask the deps, he's five minutes on out. It's nothing we talks about. There's nothing we do.

The Court. Okay. What about this - -

Defendant. I see you when I see you.

The Court. What about this witness? Is this witness gonna show up and help you in some way?

Defendant. Yeah. They got - - they can put - - yeah. I can't say out in the courtroom. Yes.

The Court. Okay.

Defendant. But the thing about it is . . . he's not working for me. I mean I just keep saying it over and over again. I know you trying to say I sound like the same thing. But if I'm old enough to know if a person is in my best interest or not, and he is not in my best interest.

The Court. Okay. Well, anyway, we're gonna proceed with the trial today and you're gonna be represented by Mr. Parker. I have no reason to dismiss him.

Defendant. . . . I asked him then can . . . we go see a chief judge? Can we put this above that? No, he won't do nothing I asked him to do.

The Court. Well, the chief doesn't rule on those issues, [defendant]. Chief judge doesn't act as an appellate judge on issues like this.

Defendant. I even asked him about the appellate, and it went no farther than that . . . . [H]e won't answer, he won't answer no questions. I can't do this. I can't do it.

The Court. There isn't basis for - - to warrant your going to another judge on the issue of Mr. Parker's representation. That's just the way it is. Mr. Parker was giving you correct information.

Defendant. Mr. Parker ain't did nothing for me.

The Court. Okay. Anyway, we're gonna move forward here with the trial.

The trial court then allowed defendant and defense attorney Parker a moment to confer privately regarding the prosecution's plea offer. The court permitted defendant another chance to express his concerns with Parker's representation. Defendant indicated that he had just learned the details of the plea offer and felt he had inadequate time to consider it. Defendant faulted attorney Parker for not placing the offer before him sooner. The court noted that there was no evidence that the prosecution presented the offer before that morning and refused to delay the trial any longer.

While indigent defendants have a constitutional right to counsel, they are not entitled to have counsel of their choosing appointed simply by requesting it. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Rather, an indigent defendant must establish good cause and show that "substitution will not unreasonably disrupt the judicial process." *Id.* "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*; see also *People v Williams*, 386 Mich 565, 574; 194 NW2d 337 (1972). "When a defendant asserts that his assigned lawyer is not adequate

or diligent or asserts . . . that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion" on the record. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). We review the trial court's decision for an abuse of discretion and will only grant relief if the court's "decision falls outside the range of reasonable and principled outcomes." *People v Strickland*, 293 Mich App 393, 397; ___ NW2d ___ (2011).

Defendant's initial request for substitute counsel at the preliminary examination was likely early enough to avoid "unreasonably disrupt[ing] the judicial process." *Bauder*, 269 Mich App at 193. Yet, defendant did not state a reason amounting to "good cause." Defendant merely stated that he was satisfied to proceed with attorney Parker in his separate criminal case, but that he was uncomfortable proceeding with Parker in this matter. The district court did not ask defendant to explain his unease or to provide examples. Instead, the court commented on Parker's experience and skill, found no breakdown in the attorney-client relationship and denied defendant's request for substitute counsel. We do not condone the district court's failure to elicit defendant's testimony in order to create a more complete record. However, given defendant's subsequent failures to establish good cause, the district court's error does not warrant relief.

In the circuit court, defendant stated several vague or general reasons for requesting substitute counsel. Defendant generally expressed dismay that attorney Parker failed to file any motions leading up to trial. The only specific example cited by defendant on the record was attorney Parker's failure to file a motion to quash the information based on the victim's and her brother's allegedly untruthful testimony at the preliminary examination. At a preliminary examination, the district court "has the duty to pass judgment on the credibility of witnesses as well as the weight and competency of the evidence, but . . . should not engage in fact finding or discharge a defendant when the evidence raises a reasonable doubt regarding the defendant's guilt." *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). Once the district court deemed the victim and her brother credible, it could support defendant's bindover on that evidence alone. The circuit court was not thereafter permitted to reconsider the district court's credibility assessment to support an order to quash certain charges. As noted by Circuit Court Judge Hathaway, once a defendant is bound over, the question of witness credibility must be reserved for trial. *People v Northey*, 231 Mich App 568, 577; 591 NW2d 227 (1998). Any such motion to quash the bindover in the circuit court would have been futile and attorney Parker's failure to raise it would not establish good cause to substitute counsel. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001).

Defendant also challenged attorney Parker's failure to interview an unnamed witness. Defendant refused to identify the proposed witness in the courtroom or to describe the witness's potential testimony. Obviously, when a defendant refuses to make a record, the court is rendered impotent to make findings and reach a conclusion. Generally, decisions regarding what witnesses to call are within the trial attorney's discretion and the failure to investigate a witness warrants relief only when the defendant is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). As defendant failed to establish the loss of a substantial defense, the court had no ground to find good cause to substitute counsel.

Defendant claimed that attorney Parker rarely visited him in jail and did not remain long enough to answer defendant's questions. Similarly, defendant complained that attorney Parker

did not take the time to discuss the specifics of the case with him, to strategize as a team, or to explain the trial process. Defendant also asserted that he and Parker did not see "eye-to-eye" and that Parker was not working for him. Defendant based his judgment of Parker's performance on a comparison to the performance of his counsel in a property crime case 13 years earlier. A defendant with appointed counsel does not have the luxury of switching attorneys simply because he prefers another's bedside manner. See *Bauder*, 269 Mich App at 193. Defendant did not cite any specific prejudice caused by Parker's treatment of the case that could have provided good cause to appoint new counsel.

At the onset of the jury trial, defendant complained that attorney Parker had not presented the prosecution's plea offer in sufficient time to allow him to properly consider it. However, as noted by the circuit court, there simply was no evidence that the prosecution presented the plea offer to defense counsel earlier and defendant had ample opportunity while awaiting trial to weigh his chances of avoiding conviction based on the evidence levied against him.

On appeal, defendant raises several other deficiencies in attorney Parker's pretrial performance that he failed to put before the circuit court. For example, defendant claims that Parker should have filed motions requesting various expert witnesses and should have investigated the victim's prior drug use. However, a trial court cannot find good cause to substitute counsel unless the grounds are actually put before it.

Ultimately, neither the district nor circuit court abused its discretion in denying defendant's motions for substitute appointed counsel. Defendant cited only general complaints about attorney Parker's performance and nothing amounted to "a legitimate difference of opinion" regarding "a fundamental trial tactic." *Bauder*, 269 Mich App at 193. We therefore affirm.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Within his challenge to the courts' denials of his motions for substitute counsel, defendant raises several instances of alleged ineffective assistance of trial counsel that occurred after the lower courts' rulings. These complaints should have been raised in a separate ineffective assistance count in defendant's appellate brief. As defendant failed to include his separate ineffective assistance claim in his brief's "Statement of Questions Presented," we need not consider it on appeal. *People v Walker*, 276 Mich App 528, 545; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). As an ineffective assistance of counsel claim incorporates questions of constitutional law and such unpreserved claims can be reviewed on the existing record, we will briefly address defendant's complaints. See *Walker*, 276 Mich App at 545. To establish an ineffective assistance claim, a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant challenges attorney Parker's failure to elicit testimony from the victim on cross-examination regarding the description of the interior of defendant's home. Defendant also

challenges defense counsel's failure to ask the nurse who conducted the victim's sexual assault examination whether there were any needle punctures on the victim's body. As a general rule, the questioning of witnesses is presumed to be a matter of trial strategy. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Attorney Parker theoretically could have impeached the victim's credibility if the victim could not accurately describe the interior of his home. However, the victim did generally testify regarding the appearance of the child's bedroom in which she was held captive. Defendant has not indicated how the victim's testimony was inaccurate. Accordingly, we have no ground to assume that further cross examination of the victim on this issue would have affected the outcome of the trial.

Also theoretically, if the nurse testified that there was no evidence of needle puncture marks on the victim's skin, then attorney Parker could have impeached the victim's testimony that defendant drugged her. Again, defendant has provided no information, such as an affidavit or medical records, from which we could determine the nurse's potential testimony in this regard. We therefore cannot ascertain the likelihood of a different outcome at trial.

III. DEFENDANT'S ABSENCE DURING THE REINSTRUCTION OF THE JURY AND READING OF THE VERDICT

Defendant next argues that he was denied his due process right to be present for the trial court's reinstruction of the jury during deliberations and the reading of the jury's verdict. A criminal defendant has a due process right to be present during his criminal proceedings "'whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge.'" *United States v Gagnon*, 470 US 522, 526-527; 105 S Ct 1482; 84 L Ed 2d 486 (1985), quoting *Snyder v Massachusetts*, 291 US 97, 105-106; 54 S Ct 330; 78 L Ed 674 (1934). This includes a due process right to be present at "the reception of the verdict." *Diaz v United States*, 223 US 442, 455; 32 S Ct 250; 56 L Ed 500 (1912). A defendant's absence from a part of the trial, however, is not grounds for automatic reversal. Rather, the defendant must establish a reasonable probability of prejudice to merit relief. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977).

The right to be present during the proceedings may be waived. Only the criminal defendant can waive his due process right to be present at his or her felony trial; defense counsel cannot waive the right on a defendant's behalf. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). The defendant need not specifically state that he waives the right to be present; the defendant may also waive the right through his conduct in the courtroom or his failure to appear. *Id.* As noted by the Court of Appeals for the Second Circuit, a criminal defendant may waive his right to be present "by voluntarily and deliberately absenting himself from the trial without good cause." *United States v Pastor*, 557 F2d 930, 933 (CA 2, 1977). If a defendant "voluntarily absent[s] himself from the proceedings," the court may weigh the burdens on the court, the prosecution, the witnesses and the jury and decide to proceed in the defendant's absence. *Id.* at 934. In rendering its decision, the court need not "accept at face value a defendant's claim of inability to appear in court." *Id.*

> The decision as to whether the defendant's voluntary absence from the trial amounts to a waiver is thus vested in the sound discretion of the trial judge, who is usually in a superior position to evaluate the evidence, including

> witnesses' credibility, because of familiarity with the background and circumstances. Moreover, where an evidentiary hearing is conducted to examine these circumstances, the trial judge's findings which form the basis of his or her decision on the issue will not be disturbed unless found to be clearly erroneous. [*Id.*]

On November 3, 2010, the parties made closing arguments, and the court excused the jury for deliberations. The following morning, November 4, 2010, stand-in defense counsel informed the court that defendant was "either ill or feigning illness" and "remain[ed] in the Wayne County Jail." Defense counsel requested the court to "instruct the jury that [defendant] is unavailable due to illness" in the event the jury was "brought out by the Court." At that point in time, defendant was in "Registry" at the jail and counsel would not be permitted entry to consult with his client. The court noted that defendant "refused to come over and contended that his leg wouldn't move and he had a bad, bad stomach ache." The court agreed to instruct the jury as requested.

The jury subsequently requested certain exhibits and a written copy of the jury instructions. Defense counsel challenged the court's desire to send altered instructions to the panel. The jury was then brought to the courtroom and the court advised the panel:

> First of all, though the defendant is obviously not here as you can see, [defendant] was at least for this morning's session unable to be in court because of a reported illness.
>
> And also Mr. Parker is not here, as you can see, and his associate Mr. Johnson is pitch hitting for Mr. Parker this morning. Mr. Parker is [in] another trial or hearing. Mr. Johnson was kind enough to stand in for him and is somewhat familiar with this case anyway.

The court then proceeded to reinstruct the jury.

After the jury was again excused to deliberate, the court officer conducted further investigation into defendant's whereabouts. The court then reported that defendant was still in his jail uniform and indicated that he was physically unable to change his clothes. As such, the court determined that defendant could not be brought into the courtroom and "[t]he best we'd accomplish would be to have him in the cell in the back." Defense counsel indicated that if defendant was "capable of coming over, I would like to have him in the back at least to be able to confer with him." Counsel indicated that he did not want to force defendant's presence, however, if he maintained his inability to come to court.

The jurors subsequently notified the court that they had reached a verdict. The court officer reinvestigated defendant's whereabouts and discovered that defendant was in "medical" and could not be brought to the courtroom because "he claimed he couldn't walk up . . . a stairway that has to be navigated in order to bring him over from the jail." Defense counsel requested that the court release the jurors and order them to return in the morning to give their verdict. The court acknowledged that the reading of the verdict is a "critical stage of the proceedings" at which defendant should be present but that, as it was only 12:30 p.m., it imposed

too great a burden on the jury to drag the trial out for an additional day. The court agreed to reread the proceedings verbatim to defendant the next morning.

On November 5, 2010, defendant was brought to the courtroom. He indicated that he learned of the jury's guilty verdict while in "medical" at the jail. The court decided to hold an evidentiary hearing on the sentencing date at which a full record could be made regarding defendant's absence during the reinstruction of the jury and the reading of the verdict. The court also issued an order for the release of defendant's medical records.

On December 10, 2010, the court held an evidentiary hearing before the sentencing. Wayne County Sheriff's Corporal Gary McDougal testified that he was the court officer on November 4, and had been tasked with transporting defendant from the Wayne County Jail across the street from the courthouse. At 8:30 a.m., McDougal went to "Registry, Division 1" and located defendant, sitting on a gurney-style chair with wheels. Defendant told the corporal that "he was unable to come to court" because "he was having stomach problems and he was unable to walk." The corporal repeatedly asked defendant if he wanted to attend court and defendant declined. The corporal returned to the jail around 9:30 a.m., but defendant indicated that he could not walk over to the court because of his continuing stomach problems. On the day of the sentencing, defendant again told the corporal that he did not want to come to court, but defendant subsequently changed his mind and agreed to come for the hearing.

Wayne County Sheriff's Deputy Joshua Dailey testified that he worked in the jail registry on November 4. He testified that defendant was sitting in a cell on a gurney-style chair with wheels on it. Defendant told Deputy Dailey that he was unable to walk and would not attend court. The prosecution also presented into evidence several taped telephone conversations from November 3 and November 4, during which defendant indicated that he was merely tired and that he did not intend to "let that dirty ass devil up there get in my face and call me guilty."

Defendant then stated on the record that he was transported from his cell to the jail registry in a gurney chair. He indicated that he had been catheterized throughout the trial and was in dire pain. Defendant could not stand the pain any longer and removed the catheter himself. After that, he was transported to the registry department. The deputies then transported defendant to medical where a doctor prescribed an antibiotic. Defendant claimed that he did not want to attend court on the day of the sentencing because someone had slammed his hands in a door, breaking his bones, but the medical staff had given him only pain medication.

The court indicated that it was "largely satisfied that, that the Court acted properly in going ahead with taking the verdict on November 3rd [sic] and that [defendant] was not disabled from appearing here on that date." However, the court wanted to review the medical records before it reached a final decision. The court proceeded to sentence defendant.

On April 15, 2011, the court held another hearing to consider the medical records. Thomas Clafton, the medical director at the Wayne County Jail, testified that he examined defendant at approximately noon on November 4, for urinary tract infection symptoms. During that examination, defendant ambulated well. The doctor diagnosed defendant with cystitis, which is an inflammation of the bladder. When asked by defense counsel, the doctor testified

that there were wheelchairs available at the jail that could have been used to transport defendant to the courtroom.

Defense counsel then moved for a mistrial based on defendant's absence in the courtroom on November 4. Specifically, the doctor testified that defendant was likely able to walk to the courtroom and the evidence revealed that defendant could have been transported in a wheelchair. "In either instance he had a right to be present and he was not." The prosecutor argued that defendant was not prejudiced by his absence because it had no bearing on the jury's verdict. The circuit court denied defendant's motion for a mistrial, noting that defendant's "decision not to come over for the verdict was a call that he made on, on his own. There was no medical emergency or medical problem that would have prevented him from coming over." The court found that the evidence revealed that defendant was capable of walking to the courtroom on November 4. Moreover, the court ruled that defendant suffered no prejudice as a result of "his voluntary non-appearance." The jury announced that they had reached a verdict and were called to the courtroom within an hour. The jury was unaware that defendant was still absent until they were brought into the courtroom.

Only after the court reached its decision did defendant object and request to make an additional record. At that point, defendant indicated that he never refused to come to court on November 4. He blamed his absence on the jail medical personnel who left his catheter in for six weeks when it was scheduled to be removed after 30 days. Defendant indicated that he told jail personnel that he could not walk to court, but never blatantly refused to attend the proceedings. The trial court asserted that defendant's last-minute statement did not affect his judgment and continued to deny defendant's motion for a mistrial.

Based on this record, the circuit court properly determined that defendant was exaggerating or feigning his illness in order to voluntarily and purposefully absent himself from trial on November 4, 2010. At most, defendant suffered from a urinary tract infection. As noted by Dr. Clafton, defendant was capable of and actually able to walk that day. Defendant told unidentified individuals during four separate telephone conversations that he was merely tired and did not intend to allow the judge or jury to announce the guilty verdict in his presence. Moreover, there is no indication that defendant was prejudiced by his absence. The court informed the jury that defendant was absent that morning due to illness. There is no record indication that the jury was aware that defendant had still failed to appear by the time they reached a verdict.

Defendant contends that he was prejudiced because, during the reinstruction of the jury, the circuit court remedied its earlier erroneous omission of an element of the CSC offenses. Defendant suggests that if he or his regularly appointed counsel had been present, they could have prevented the change in instruction. Defendant's stand-in counsel and the prosecutor argued the propriety of the new instruction on the record. The instruction given to the jury on November 4 represented a more accurate statement of the statutory meaning of sexual penetration. See MCL 750.520a(r). Because the additional instruction would have been provided regardless of whether defendant was present, it did not affect defendant's substantial rights. Accordingly, defendant was not deprived of due process. *People v Musser,* 53 Mich App 683, 694; 219 NW2d 781 (1974).

Defendant also complains that the trial court exhibited bias against him by deciding defendant's motion for a mistrial before hearing defendant's testimony on April 15. In general, a party who challenges a judge based on bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). "Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Here, defendant did address the court on November 5 and December 10, 2010, and explained his absence for the record. Although defendant was not under oath at that time, he was given the opportunity to place his explanation on the record and the trial court considered it before rendering judgment on defendant's motion.

We further note that defense counsel's motion for a mistrial following the April 15, 2011 hearing was misplaced. A mistrial occurs when a judge brings a trial to an end without a determination of the merits. *People v Grace*, 258 Mich App 274, 280; 671 NW2d 554 (2003). The merits of this case had already been determined, and an appeal as of right had already been filed in this Court. Therefore, defense counsel should actually have requested a new trial pursuant to MCR 6.431(A)(2).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher