STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2012
v	No. 302876 Ottawa Circuit Court
GERALD LEE HUDSON, JR., Defendant-Appellant.	LC No. 10-034578-FH

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating while intoxicated, third offense, MCL 257.625(1); MCL 257.625(9); malicious destruction of police property, MCL 750.377b; and resisting and obstructing a police officer, MCL 750.81d. He was sentenced as an habitual offender, third offense, MCL 769.11, to two to ten years' imprisonment for operating while intoxicated, two to eight years' imprisonment for malicious destruction of police property, and one year and nine months to four years' imprisonment for resisting and obstructing a police officer. Defendant appeals by right. We affirm.

Defendant argues that his right to counsel was violated because he did not effectively waive it when he sought to act, in part, as his own attorney. Although defendant has no constitutional right to so-called hybrid representation, the trial court's decision to allow a defendant to act as co-counsel is reviewed for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). "[W]hether to allow a defendant to participate in his own defense along with counsel in 'hybrid representation' is a matter committed to the sound discretion of the trial court." *United States v Mosely*, 810 F2d 93, 97-98 (CA 6, 1987).

The Sixth Amendment of the United States Constitution explicitly guarantees a defendant in a criminal case the right to the assistance of counsel and implicitly guarantees the right of self-representation. US Const, Am VI; *Faretta v California*, 422 US 806, 818-832; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Michigan in its Constitution and by statute explicitly guarantees an accused the right to the assistance of counsel and the right of self-representation. Const 1963, art 1, §§ 13 & 20; MCL 763.1; *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). Because the assertion of the right to self-representation necessarily requires the abandonment of the right to counsel, trial courts must ensure that an accused does so knowingly and intelligently and only after being informed of the dangers of self-representation. *Faretta*, 422 US at 835. "[T]he right of self-representation and the right to counsel are mutually exclusive; a defendant must *elect* to

conduct his own defense voluntarily and intelligently, and must be made aware of the dangers and disadvantages of self-representation in order to proceed pro se." *People v Russell*, 471 Mich 182, 189; 684 NW2d 745 (2004) (citations and quotation marks omitted). Although both the right to counsel and the right of self-representation are each fundamental constitutional rights, representation by counsel, as a guarantor of a fair trial, is the rule and not the exception in the absence of a proper waiver of counsel. *Id*. at 189-190.

Because of the tension between these constitutional rights, the court must make certain findings before it permits a defendant to represent himself, which encompasses a waiver of the right to counsel. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). First, the defendant's request to represent himself must be unequivocal. Second, the trial court must determine that the defendant is knowingly, intelligently, and voluntarily waiving his or her right to counsel. Third, the trial court must determine that the defendant's self-representation will not disrupt, unduly inconvenience, or burden the court or the administration of the court's business. *Id*.; *Anderson*, 398 Mich at 367-368. The trial court must also comply with MCR 6.005(D), *Williams*, 470 Mich at 642-643. which provides that a trial court may not permit a defendant to waive his right to counsel without "(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation," and (2) offering the defendant the opportunity to consult with a retained attorney or, if the defendant is indigent, the opportunity to consult with an appointed attorney.

Defendant argues that his waiver of counsel was equivocal because he voiced concern that he lacked access to a law library. Though defendant raised the issue of library access during the hearing on his request to act as co-counsel, the record establishes that both defendant and the trial court acknowledged that the issue of access to a law library was distinct from the proceedings regarding waiver of counsel and would be considered separately on its own merits. Accordingly, the fact that defendant raised the issue of library access does not prevent a finding that defendant's waiver was unequivocal. *Williams*, 470 Mich at 642.

Initially, there was confusion concerning the nature of defendant's request to act as co-counsel. Five months before trial, the trial court permitted defendant's appointed counsel to withdraw and appointed attorney David Hall—in whom defendant expressed confidence—to represent defendant. One month before trial at a bond hearing, defendant stated, "I am supposed to be co-counsel in this case according to the transcript records." Defendant apparently was referring to the proceeding at which Hall was appointed counsel, noting that "the whole appointment of counsel . . . was on the record." The trial court responded it would review the transcript and took no other action.

On the first day of trial, before voir dire of the jury venire, the trial court opened the record by noting that it understood that defendant wanted to represent himself with standby counsel. Defendant clarified that he was merely requesting to act as co-counsel: "to [be] an equal with Mr. Hall, not representing myself." The trial court advised defendant regarding his right to counsel, the dangers of self-representation, which defendant stated he understood, and that defendant would not be permitted to disrupt the court proceedings. With respect to acting as co-counsel, the trial court advised defendant that only one counsel would be permitted to act at any given time. The trial court asked defendant "[i]s it your decision to represent yourself, at

least in part, and are you making that decision voluntarily?" Defendant responded, "In part that would be correct, Your Honor." The trial court found that "defendant unequivocally has waived his right to counsel in part," noting that "Mr. Hall will be present through the trial and take those duties which the defense and he agrees will be assigned to him." The court also determined defendant's waiver of counsel was knowing, voluntary and intelligent, and that defendant's self-representation would not unduly disrupt or inconvenience the court.

Although the right of self-representation and the right to counsel are mutually exclusive and courts must make every reasonable presumption against waiver of the right to counsel, *Russell*, 471 Mich at 188-189, here, the record fully supports the trial court's determination that, to the extent necessary to act as his own counsel, defendant unequivocally, knowingly, voluntarily and intelligently waived his right to counsel. Except with respect to advising defendant of the maximum and any minimum sentence potential of the charged offenses, MCR 6.005(D)(1), the trial court fully complied with established judicial criteria for a valid waiver of counsel. *Williams*, 470 Mich at 642-643; *Anderson*, 398 Mich at 367-368. To the extent that the trial court failed to comply with MCR 6.005(D)(1), see *Russell*, 471 Mich at 191-192 and *Williams*, 470 Mich at 646-647, the error was harmless because defendant was never unrepresented by counsel. As the *Russell* Court observed, in effect, any irregularities in the waiver proceeding will not create an appellate parachute when "the defendant . . . continue[s] to be represented by counsel." *Russell*, 471 Mich at 192. Indeed, the Sixth Circuit Court of Appeals has held that *Faretta* warnings are not even required where a defendant seeks to merely supplement his counsel's representation by acting as co-counsel rather than proceeding pro se. See *United States v Cromer*, 389 F3d 662, 682-683 (CA 6, 2004).[1]

"'Hybrid representation' describes an arrangement whereby both the defendant and his attorney would conduct portions of his trial and share joint presentation of his defense, while the defendant retains ultimate control over defense strategy." *People v Dennany*, 445 Mich 412, 440 n 17; 519 NW2d 128 (1994). A defendant does not have a constitutional right to hybrid

[1] The *Cromer* Court opined:

> A defendant who seeks merely to supplement his counsel's representation, as [the defendant] did here, has failed to avail himself of his right to self-representation and thus failed to waive his right to the assistance of counsel. . . . Here, [the defendant] did not waive his right to counsel because he continued to receive substantial assistance from counsel, even while he was actually questioning the witness. Because there was no waiver, clearly and unequivocally asserted, there was no need to warn [the defendant] about the consequences of that waiver. [*Cromer*, 389 F3d at 683.]

Similarly, defendant cites an unpublished opinion that held where a trial court permits hybrid representation, no waiver of counsel occurs. *People v Childress*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 2012 (Docket No. 299592), lv den ___ Mich ___; 820 NW2d 897 (2012). We are not bound by unpublished opinions but may consider them if we deem them persuasive. MCR 7.215(C).

representation but a trial court in its discretion may allow it. *Id*. at 441; *Cromer*, 389 F3d 681 n 12. A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011).

In this case, defense counsel, Mr. Hall, conducted the voir dire of the jury, made an opening statement, presented defendant's testimony, participated in some cross-examination, and delivered a closing argument. Defense counsel also advised defendant regarding objections to the prosecution's evidence. Defendant personally cross-examined the prosecution's witnesses. Moreover, defendant's cross-examination was consistent with his defense theory, eliciting helpful evidence. The record does not support that defendant elicited obviously prejudicial evidence while acting as co-counsel. Further, defendant has not identified any defenses he lost or testimony that was not developed in support of his theory of case. Finally, because defendant was not totally deprived of his right to counsel at any critical stage of the trial, it is appropriate to apply harmless error analysis to any error of the trial court in not substantially complying with MCR 6.005(D)(1). See *People v Willing*, 267 Mich App 208, 224-228; 704 NW2d 472 (2005). We conclude that this record demonstrates the trial court's decision to permit hybrid representation was within the range of reasonable and principled outcomes, i.e., not an abuse of discretion. *Dennany*, 445 Mich at 441; *Strickland*, 293 Mich App at 397. We also conclude that any error of the trial court with respect to MCR 6.005(D)(1) does not merit reversal because it was harmless: the result here was not "inconsistent with substantial justice," MCR 2.613(A), nor does it appear "after an examination of the entire cause . . . that the error complained of has resulted in a miscarriage of justice." MCL 769.26. [2]

We affirm.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ /Amy Ronayne Krause

[2] Because the trial court fully provided defendant with the *Farretta-Anderson* warnings, and defendant remained represented by counsel at all times, any error complying with MCR 6.005(D)(1) was not one of constitutional magnitude. Nevertheless, we would also conclude any error here was harmless beyond a reasonable doubt, the standard applicable to nonstructural constitutional error. See *Willing*, 267 Mich App at 223-224.